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COMMON IGNORANCE: MEDICAL MALPRACTICE LAW AND THE MISCONCEIVED APPLICATION OF THE “COMMON KNOWLEDGE” AND “RES IPSA LOQUITUR” DOCTRINES

*Amanda E. Spinner**

I. INTRODUCTION

Today, approximately one in every fourteen physicians has a medical malpractice claim filed against them in an average year, and most physicians will be sued for malpractice at least once during their careers.¹ Unfortunately, the large number of malpractice claims brought against physicians each year often leads doctors to practice “defensive medicine,” which then “can result in increased diagnostic testing, increased referral rates, prescription of unnecessary medication, and avoiding treating certain conditions or performing certain procedures.”² With such a large number of doctors being sued each

*J.D. Candidate 2016, Touro College Jacob D. Fuchsberg Law Center; B.A. 2012 in Legal Studies, Ithaca College. Special thanks to my *Touro Law Review* Comment Editor Alyssa Wanser for her kindness, support, constructive criticism, and unwavering confidence in me throughout the writing process. I would also like to thank my parents for their continuous support, guidance, and encouragement throughout my academic career.

¹ *NEJM: Neurosurgeons Face the Most Malpractice Claims*, THE ADVISORY BD. CO. (Aug. 18, 2011), <http://www.advisory.com/Daily-Briefing/2011/08/18/NEJM-Neurosurgeons-face-the-most-malpractice-claims>.

² *Most Common Malpractice Reasons: Missed Cancers, Heart Attacks: Doctors Given ‘Mixed Messages’ on Missed Diagnoses, Overtesting*, THE ADVISORY BD. CO. (July 22, 2013), <http://www.advisory.com/Daily-Briefing/2013/07/22/Most-common-malpractice-reasons-Missed-cancers-heart-attacks>. Defensive medicine has been described by the Congressional Office of Technology Assessment as occurring when:

[D]octors order tests, procedures, or visits, or avoid high-risk patients or procedures, primarily (but not necessarily or solely) to reduce their exposure to malpractice liability. When physicians do extra tests or procedures primarily to reduce malpractice liability, they are practicing positive defensive medicine. When they avoid certain patients or procedures, they are practicing negative defensive medicine.

Paul A. Manner, *Practicing Defensive Medicine—Not Good for Patients or Physicians*, AM. ACAD. OF ORTHOPAEDIC SURGEONS (Jan/Feb 2007), <http://www.aaos.org/news/bulletin/janfeb07/clinical2.asp>. Therefore, doctors concerned about medical liability are pushed into

year for malpractice around the country, and with the threat of malpractice claims directly influencing how doctors perform their jobs, it is important that courts remain consistent in their application of medical malpractice rules and principles. Such a system would help ensure fair and just outcomes for both patients who in fact do suffer from a doctor's negligence, and for those doctors who do not stray from the standard of care to which they are required to adhere.

However, the courts, in dealing with medical malpractice litigation, persistently fail to distinguish between the doctrines of "common knowledge" and "res ipsa loquitur." These guiding principles, when applicable, are distinct and important rules, which provide for different evidence to be admissible at trial. The "common knowledge" doctrine applies in cases where direct evidence of the defendant's negligent conduct is given to the jury, and based upon that the jury may conclude that the physician breached customary practice. However, the doctrine of "res ipsa loquitur" provides instead that the jury may infer from circumstantial evidence that the physician must have engaged in negligent behavior and such negligence caused the injuries the plaintiff suffered. Consequently, this confusion between the doctrines may lead to the inadmissibility of valid evidence or the court granting a motion to dismiss, when, in fact, dismissal is unwarranted. As a result, doctors and patients are seeing inconsistent outcomes in medical malpractice litigation.

This Comment will examine the law of medical malpractice both generally and specifically in relation to the "common knowledge" and "res ipsa loquitur" doctrines, and the language courts have used when applying these doctrines that often results in an unclear distinction between these principles. Section II will begin with an explanation of the meaning of malpractice and how it differs from ordinary negligence, followed by a discussion of the specific rules created to address medical malpractice actions. Section III will explain the "common knowledge" exception relating to a malpractice case where no expert witness is required for the jury to find that a defendant doctor acted negligently. Section IV will explore the doctrine of "res ipsa loquitur" in medical malpractice cases. Section V will analyze the judicial inconsistency in applying the "common knowledge" and "res ipsa loquitur" doctrines and the ramifications of

ordering more tests and procedures than necessary which can ultimately lead to more expensive healthcare. *Id.*

such inconsistent language on the medical and other relevant communities involved. Section VI will discuss possible solutions and improvements that the judiciary and the bar can make to help maintain consistency in medical malpractice actions. Finally, Section VII will provide relevant conclusions.

II. THE MEANING OF MALPRACTICE

A. Medical Malpractice Generally and the Custom Standard

Today, medical malpractice is seen as a separate and distinct doctrine applied to medical professionals stemming from ordinary negligence.³ Medical malpractice is a particular type of negligence action in which a doctor⁴ is held liable when he deliberately, or by inattention or neglect, engages in conduct that falls below common practice.⁵ In an ordinary negligence action, the fact finder hears evi-

³ Theodore Silver, *One Hundred Years of Harmful Error: The Historical Jurisprudence of Medical Malpractice*, 1992 WIS. L. REV. 1193, 1193, 1196 (1992). According to Silver, the precedents from 1876 and before plainly indicated that a finding of medical malpractice was to rest on the same standard as that which applied to ordinary negligence actions, to wit, the one premised on such behavior as would be displayed by a reasonable person under the relevant circumstances, counting as a circumstance that the defendant has training as a physician. *Id.* at 1195-96, 1204-06. The language employed by later courts shifted the standard in cases where doctors were negligent from ordinary negligence to medical malpractice custom. *Id.* at 1222, 1225. See also other states' civil jury instructions, such as the California Civil Jury Instructions, CA BAJI 6.00.1, which often state that instructions on ordinary negligence should not be given where the plaintiff's case rests on malpractice. CAL. CIVIL JURY INSTR.—CA BAJI 6.00.1 (2015).

⁴ Doctors are not the only professionals in the medical community who can be sued for malpractice. For example, healthcare providers in general can be liable for medical malpractice. According to Minnesota's Civil Jury Instructions, CIVJIG 80.10, any "doctor, dentist, advanced practice nurse, specialist or other healthcare provider" may be liable for "fail[ing] to provide care that meets an accepted standard of care under the circumstances." 4A MINN. PRAC., JURY INSTR. GUIDES—CIVIL CIVJIG 80.10 (2014). Furthermore, the instructions specifically note that, "this instruction uses 'doctor' in a generic sense. Judges should feel free to substitute the title of the particular kind of doctor, such as medical doctor, osteopathic physician, or chiropractor, or title of the particular kind of specialist, such as a surgeon or a neurologist." *Id.*

⁵ See N.Y. PATTERN JURY INSTR.—CIVIL 2:150 (2014).

Malpractice - Physician: Malpractice is professional negligence and medical malpractice is the negligence of a doctor. Negligence is the failure to use reasonable care under the circumstances, doing something that a reasonably prudent doctor would not do under the circumstances, or failing to do something that a reasonably prudent doctor would do un-

dence of what the defendant did or failed to do and it is for the fact finder to conclude that such conduct was or was not consistent with the behavior of an ordinarily reasonable person under the relevant circumstances.⁶ However, in a medical malpractice action, it is said that the standard by which a doctor is measured is that of “customary practice” among physicians, and not that of a reasonable person under the circumstances.⁷ This rule, commonly called the professional

der the circumstances. It is a deviation or departure from accepted practice. A doctor who renders medical service to a patient is obligated to have that reasonable degree of knowledge and skill that is expected of an (average doctor, average specialist) who (performs, provides) that (operation, treatment, medical service) in the medical community in which the doctor practices. *(If there is evidence that the doctor should have complied with standards that exceed the standards of the medical community in which the doctor practices, the following should be charged:)* The doctor must also comply with minimum (statewide, national) standards of care.) The law recognizes that there are differences in the abilities of doctors, just as there are differences in the abilities of people engaged in other activities. To practice medicine a doctor is not required to have the extraordinary knowledge and ability that belongs to a few doctors of exceptional ability. However every doctor is required to keep reasonably informed of new developments in (his, her) field and to practice (medicine, surgery) in accordance with approved methods and means of treatment in general use. A doctor must also use his or her best judgment and whatever superior knowledge and skill (he, she) possesses, even if the knowledge and skill exceeds that possessed by the (average doctor, average specialist) in the medical community where the doctor practices. If the doctor is negligent, that is, lacks the skill or knowledge required of (him, her) in providing a medical service, or fails to use reasonable care in providing the service, or fails to exercise his or her best judgment, and such failure is a substantial factor in causing harm to the patient, then the doctor is responsible for the injury or harm caused. *[Where appropriate, add:]* A doctor's responsibility is the same regardless of whether (he, she) was paid.

Id. See also other states pattern jury instructions on medical malpractice such as Pennsylvania's Suggested Standard Civil Jury Instructions, PA-JICIV 14.00, and Maryland's Civil Pattern Jury Instructions, MPJI-Cv 27:1. PA. SUGGESTED STANDARD CIVIL JURY INSTR.—Pa. SSJI § 14.00 (2013); MD. CIVIL PATTERN JURY INSTR.—MPJI-Cv 27:1 (2013).

⁶ Sam A. McConkey, IV, Comment, *Simplifying the Law in Medical Malpractice: The Use of Practice Guidelines as the Standard of Care in Medical Malpractice Litigation*, 97 W. VA. L. REV. 491, 496 (1995).

⁷ Silver, *supra* note 3, at 1194. This rule of professional custom arose from “conceptual confusion, compounded by the law’s propensity toward ‘lazy repetition.’” *Id.* at 1219. Early nineteenth century cases made a distinction between the skill and care doctors were obligated to use. These cases spoke of physicians “hav[ing] such skill[s] as his colleagues normally possess[ed], but us[ing] such care as would be exercised by all reasonable persons under like circumstances.” *Id.* at 1220. Then later courts began to “overlook the distinction between (1) the skill with which a physician was obliged to approach his task, and (2) the

custom rule, allows patients to prevail against negligent doctors only if they can establish that the physician's actions violated customary practice.⁸ Customary practice is determined by physicians as a group establishing the legal standard to which they are held accountable to the rest of the world.⁹ In other words, the medical profession establishes its own standard of care, exempting doctors from being evaluated based on an ordinary negligence standard of doing what a reasonable person would under the circumstances.¹⁰ Therefore, since a doctor is bound only to follow ordinary practice within his profession, a mere negative result following treatment by a physician is not necessarily considered malpractice because the standard he is judged by may be lower than the standard to which an ordinary person would be held to.¹¹

In *Quirk v. Zuckerman*,¹² the court held that a doctor is charged with a duty to exercise due care and such due care is measured by the conduct of the doctor's own peers.¹³ This language employed by the court emphasizes the custom standard, which is unique to the medical profession. Moreover, in *Ahola v. Sincock*,¹⁴ the court, in quoting an earlier decision, stated that:

When a physician exercises that degree of care, diligence, judgment, and skill which physicians in good standing of the same school of medicine usually exer-

care that he was obliged to give it." *Id.* at 1222. The courts eventually blended these two once distinct concepts to form the idea the physician's duty was that of ordinary skill and care which meant the skill and care that would be seen generally in the profession. *Id.* at 1222-26. See generally Maxwell J. Mehlman, *Professional Power and the Standard of Care in Medicine*, 44 ARIZ. ST. L.J. 1165 (2012).

⁸ Silver, *supra* note 3, at 1194.

⁹ *Id.*

¹⁰ *Id.* at 1213. Silver goes on to suggest that we should go back to the ordinary negligence standard upon which we hold everyone accountable to except physicians, and provide juries with experts who can identify the risks and benefits at issue. Armed with this expert knowledge not of custom but of risks and benefits, the jury would be competent to determine, as it does in any other negligence suit, whether the defendant physician had acted with reasonable care. *Id.* at 1218.

¹¹ *Id.* at 1212-14. "The nation's physicians may lawfully adopt and follow practices that are patently negligent and unreasonable under the standard of ordinary care to which all others are held. The medical community is answerable not for want of care but for want of conformity." Silver, *supra* note 3, at 1213.

¹² 765 N.Y.S.2d 440 (Sup. Ct. Nassau County 2003).

¹³ *Id.* at 443.

¹⁴ 94 N.W.2d 566 (Wis. 1959).

cise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of medical or surgical science at the time, he has discharged his legal duty to his patient.¹⁵

The language used by this court, and countless others, demonstrates the separate and distinct standard by which the medical community is judged in medical malpractice cases.

It is said that doctors are to be judged by their peers' conduct and held to such standard because medicine involves knowledge beyond the understanding of the ordinary and average layperson.¹⁶ Therefore, unlike in ordinary negligence actions, the jury is instructed in medical malpractice cases to evaluate whether the physician met the custom used in his profession, and not evaluate whether the custom is a reasonable one according to the jury's own understanding of right and wrong.¹⁷ The triers of fact rely on medical experts to testify as to the relevant standard to be used in each medical malpractice case because many patients, judges, and juries cannot understand the complexities of medicine and do not know the customary procedures to be used with each medical problem that arises.¹⁸ Furthermore, when patients visit their doctors, they rely on the expertise of their doctors to know the relevant medical treatment appropriate under the circumstances since the doctor is the one with the medical training who should know the different ways to treat each medical condi-

¹⁵ *Id.* at 576 (quoting *Nelson v. Harrington*, 40 N.W. 228 (Wis. 1888)).

¹⁶ *Mcconkey*, *supra* note 6, at 499-500.

¹⁷ *Id.* *But see* *Helling v. Carey*, 519 P.2d 981 (Wash. 1974), holding that defendants, ophthalmologists, were negligent as a matter of law in failing to administer a simple glaucoma test to the plaintiff, despite uncontradicted expert testimony that it was custom for ophthalmologists not to administer glaucoma tests to patients under age forty because the chances of having glaucoma under that age were so small. *Id.* at 983.

Under the facts of this case reasonable prudence required the timely giving of the pressure test to this plaintiff. The precaution of giving this test to detect the incidence of glaucoma to patients under 40 years of age is so imperative that irrespective of its disregard by the standards of the [ophthamology] profession, it is the duty of the courts to say what is required to protect patients under 40 from the damaging results of glaucoma.

Id. *See also* *Toth v. Cmty. Hosp. at Glen Cove*, 239 N.E.2d 368 (N.Y. 1968); *Morgan v. Sheppard*, 188 N.E.2d 808 (Ohio Ct. App. 1963).

¹⁸ *Randall Bovbjerg, The Medical Malpractice Standard of Care: HMOs and Customary Practice*, 1975 DUKE L.J. 1375, 1392 (1976); *see infra* Section II.B.

tion.¹⁹

However, by accepting medical custom as the standard by which defendant physicians are judged, medical malpractice law has left all judgment to medical practitioners, while leaving to the jury the sole task of weighing credibility.²⁰ In other words, the jury typically hears from expert witnesses for both sides and must judge not whether the standard is proper, but whether the standard set by the medical community was actually met by the doctor when treating the plaintiff.²¹ The legal ramifications of this reality could result in physicians setting standards for themselves that are too high or too low, and could ultimately result in allowing an entire class of professionals to “legitimize [their own] corner cutting,” by making that the standard of care, and making it customary by practicing such standard.²² Moreover, by allowing physicians to set their own standard of care, the result could be devastating for patients who have suffered as a result of a doctor’s negligence, but the doctor prevails in the case simply because the standard of care was low.²³ Research has shown that doctors win about eighty percent of the malpractice claims brought against them and that plaintiffs rarely win malpractice cases that reach the jury for a verdict.²⁴ While it seems there could be a multiplicity of reasons for such outcomes at trial, it is likely that a large part of the reason physicians frequently win malpractice cases could be the result of the judges’ reliance on the medical expertise of the physicians, and the custom standard they set for themselves.²⁵

Overall, the custom standard is unique in that physicians are afforded the opportunity to set the standard of care by which they will be judged. It can be said that such practice is important and helpful because the field of medicine is complicated and vast, and therefore having physicians set the standard of actions by which other physi-

¹⁹ Bovbjerg, *supra* note 18, at 1393-94 n.56.

²⁰ *Id.* at 1393.

²¹ *Id.*

²² *Id.* at 1394.

²³ Mere negative results resulting from a doctor treating a patient may not equate to malpractice for the very reason that physicians set their own standard. For example, a physician cannot be held liable for failing to diagnose a condition that previously was unknown to medical science. *Banister Infant v. Marquis*, No. 027310/2004, 1000 WL 178733 (N.Y. Sup. Ct. Suffolk County 2004), *aff’d*, 929 N.Y.S.2d 748 (App. Div. 2d Dep’t 2011).

²⁴ John Gever, *Docs Win Most Malpractice Cases at Trial*, MEDPAGE TODAY (May 5, 2012), <http://www.medpagetoday.com/PracticeManagement/Medicolegal/32692>.

²⁵ *See supra* note 10; *supra* note 11 and accompanying text.

cians in that area of medicine must abide makes sense because only other doctors understand such complexities. However, having doctors set their own standard of care can also be harmful to patients who receive care because the doctors in a particular field can choose to set a standard that is low and therefore avoid liability even for behavior that is clearly negligent.

B. The Expert Witness Rule

Because physicians create the standard by which to hold themselves accountable for negligence, it is said that a jury of non-physicians has no basis, generally, on which to conclude that a given practice is or is not customary.²⁶ A physician is to be judged by the standard which other doctors in his community work, so an expert witness is almost always required to explain to the jury the relevant custom standard, which is often beyond the jurors' understanding of basic medicine.²⁷ The expert witness should be a physician in that doctor's field who can testify to the standard by which the doctor is measured and whether or not such standard was abided by.²⁸ Therefore, the plaintiff, in order to make out a prima facie case, must ordinarily proffer an expert witness in order to testify as to what is and is not customary practice.²⁹ This "expert witness" rule is applied in medical malpractice cases because it is said that the discipline of medicine is too complex and technical for a jury to determine on its own what is or is not considered custom, and thus only a physician can attest to the standard the defendant should have met.³⁰ This rule applies only in cases where jurors cannot ascertain the standard by which the physician should have treated his patient because of the complexity of medicine; but the "expert witness" rule should not be applied in cases where the physician's departure from custom was so gross or obvious that malpractice was clearly committed by the doc-

²⁶ Mcconkey, *supra* note 6, at 499.

²⁷ *Id.*

²⁸ *Id.* at 500. In New York, a physician specialist in the same field as the defendant doctor is not necessary, but instead the witness needs to have knowledge of the field and be familiar with it so that the opinion they render is reliable. See *Ozugowski v. New York*, 935 N.Y.S.2d 613 (App. Div. 2d Dep't 2011); *Mustello v. Berg*, 845 N.Y.S.2d 86 (App. Div. 2d Dep't 2007); *Behar v. Coren*, 803 N.Y.S.2d 629 (App. Div. 2d Dep't 2005); *Postlethwaite v. United Health Services Hospitals, Inc.*, 773 N.Y.S.2d 480 (App. Div. 3d Dep't 2004).

²⁹ *Id.*

³⁰ *Id.* at 499-500.

tor.³¹

When the jury cannot on its own decide that what a defendant physician did or did not do violated the standard of conduct that governs a similarly situated physician under the operative circumstances, the “expert witness” rule will apply, and the fact finder is to determine merely whether the defendant acted in accordance with common practice among physicians.³² Stated otherwise, it is not for the jury to determine that the defendant’s conduct was or was not reasonable; custom is the standard, and the jury is to determine that the defendant did or did not abide by it. The custom standard is presented to the finder of fact ordinarily by an expert witness who can testify as to how physicians who practice in the same area of medicine as the defendant would have acted under the same set of circumstances.³³ It is by use of this expert testimony that the fact finder determines whether the defendant physician abided by custom in treating the plaintiff and whether the doctor did in fact commit malpractice.

An example of the application of this rule is illustrated in *Gaska v. Heller*,³⁴ where the court found that a lay jury, without the help of an expert witness, would not be able to assess whether the method and manner used in securing a drainage tube to the plaintiff’s chest after neck surgery was proper and necessary under the circumstances.³⁵ This illustration shows how expert witnesses’ testimony is indispensable in medical malpractice cases where the typical juror who is not medically trained cannot understand the defendant physician’s conduct and the standard by which he is judged without expert testimony.

Since the plaintiff is ordinarily required to offer an expert witness on the stand to testify as to the standard to which the physician should be held in a particular case, the defendant physician is then forced to present his own expert witness to testify to a standard contrary to the plaintiff’s, and “rebut the opposing expert’s conclu-

³¹ Timm Cramm et al., *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 WAKE FOREST L. REV. 699, 700 (2002). In cases where the custom standard is clear and ascertainable to the ordinary juror because the result would not have occurred absent negligence, the doctrine of “res ipsa loquitur” is used.

³² Mcconkey, *supra* note 6, at 500.

³³ Cramm, *supra* note 31, at 700.

³⁴ 816 N.Y.S.2d 523 (App. Div. 2d Dep’t 2006).

³⁵ *Id.* at 524.

sions.”³⁶ The jury is then required to evaluate the defendant’s conduct based upon the expert witness’ testimonies to determine which they find the most credible and persuasive.³⁷ The “expert witness” rule thus essentially creates a battle of the experts in each case and only the party who can best convince the jury will prevail. For example, in *Cruz v. Paso Del Norte Health Foundation*,³⁸ the court stated that, “[m]edical malpractice cases often present ‘a battle of the experts.’”³⁹ During such battles, “it is the sole obligation of the jury to determine the credibility of the [expert] witnesses” and weigh their testimony accordingly.⁴⁰ The court, in discussing this process, stated that the attorneys for each side must persuade the jury that their expert is the most credible, and the courts then bear the burden of making sure the adversarial process was “fair and carried out according to the rules.”⁴¹ Therefore, cases where expert witness testimony is required result in dueling experts who each need to convince the jury that the standard by which they would treat the patient is the proper one.⁴²

It seems that this “battle of the experts” can likely hurt either side in the process. Unfortunately for either plaintiff or defendant, depending upon the experts they present, during these trials the emphasis is placed upon the individual witness’s credibility and qualifications in front of the jury, but not on the actual medical information

³⁶ Mcconkey, *supra* note 6, at 500.

Generally, expert physician witnesses base their testimony on how they would have conducted themselves or how they believe other physicians in the applicable comparison group would have conducted themselves in the particular situation at issue. Such a basis for testimony, however, is incorrect. Consequently, the correct process of comparing the defendant’s conduct with established professional norms degenerates into a contest of credentials between the opposing experts. For instance, when the plaintiff’s expert testifies that the defendant’s acts or omissions were not within the standards of the profession, she is really saying only that she “would not have treated the patient that way.”

Id.

³⁷ *Id.* Again, the jury is not to determine whether the standard was reasonable, but only to evaluate whether the defendant physician did in fact abide by such standard in treating the patient. *Id.*

³⁸ 44 S.W.3d 622 (Tex. Ct. App. 2001).

³⁹ *Id.* at 646.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

being conveyed by the expert.⁴³ Under such circumstances, the jury may decide the case for either plaintiff or defendant depending upon which expert or attorney they liked the most, instead of deciding which side made the best arguments and presented the best testimony and medical information.⁴⁴ It then seems that it is not a matter of who practices medicine properly and treats their patients appropriately, but instead it seems that the courtroom has become a venue for theatrics and a place where one who can bring the best actor wins. In theory, jurors are to listen to what each expert says and then decide which expert they find most credible and whether the physician met such a standard of care supposedly set by the medical profession.⁴⁵ However, ordinary people judge others on appearance and demeanor and not necessarily on the content of their speech. A juror may like one expert more than the other because of his or her general appearance in the courtroom and rapport with the attorneys and may, therefore, believe one expert over another based on his or her first impression of the witness.

This can especially be the case where an expert witness is hired whose sole job is testifying as an expert in court, and who no longer or rarely practices medicine.⁴⁶ These experts are often referred to as “professional witnesses” and because they spend most of their time acting as expert witnesses, they “may shade, alter or enhance their testimony to strengthen the case of the party they represent.”⁴⁷ It is argued that such biased and altered testimony actually impedes the jury in a medical malpractice action where the fact finder must decide whether the defendant breached the custom which he

⁴³ Steven E. Pegalis, *Medical Malpractice: The Art of Advocacy when Engaging in the “Battle of the Experts,”* 23 AM. J. TRIAL ADVOC. 259, 259 (1999).

Experts on each side are cross-examined and often “attacked” by opposing counsel. The jury is frequently urged not to accept the opinion of the adversary’s expert because “our expert is more qualified than their expert” or “their expert is biased and therefore not worthy of belief.” These “attacks” often confuse the jury.

Id.

⁴⁴ *Id.*

⁴⁵ Mcconkey, *supra* note 6, at 500.

⁴⁶ Anne M. Glaser, *Impartial Medical Expert Testimony in Illinois: Removing the Barriers to Its Use*, 27 VAL. U. L. REV. 695, 696-97 (1993). See also Russell G. Donaldson, Annotation, *Propriety of Cross-Examining Expert Witness Regarding His Status as “Professional Witness,”* 39 A.L.R.4TH 742 (1985).

⁴⁷ Glaser, *supra* note 46, at 696-97.

was required to abide by.⁴⁸ Experts in these circumstances, instead of helping the jury by explaining the relevant custom the defendant was supposed to meet, only confuse the jury by forcing them to determine the credibility of both parties' witnesses without knowledge of what the medical community actually requires.⁴⁹ In other words, the professional witness uses his expertise as a witness and while presenting the relevant custom to which the defendant should have abided, he embellishes and exaggerates his testimony to sway the jury to find in favor of the side he represents.

Furthermore, while it is said that experts testify to what the custom is in the relevant medical community, experts are said to testify as to what conduct they personally would have taken under the circumstances and thus such testimony can be contorted to fit the situation in which the expert finds himself.⁵⁰ Additionally, one could argue that these experts who have ceased practicing medicine and have become full time expert witnesses may not be experts at all. It could be hard, if not impossible, to conclude what the custom standard is to which a defendant physician should abide when one is no longer practicing medicine as a working healthcare provider. Moreover, it may very well be hard to convince a jury that such a witness is credible when he has not practiced medicine in years, because science evolves and what might have been the custom and practice at one time might have changed. While the expert might be said to be up to date because of research in the field, it seems that experts who testify as to the custom to be used by physicians should be those who are practicing physicians or who practiced for a certain number of years and are therefore considered experts in the field.⁵¹

In sum, the expert witness rule is an important aspect of medical malpractice cases, which often works in conjunction with the custom standard. The rule requires an expert witness to testify in most cases to explain to the jury the relevant custom standard within

⁴⁸ *Id.* at 697.

⁴⁹ *Id.* at 697-98.

⁵⁰ Mcconkey, *supra* note 6, at 500.

⁵¹ See Cramm, *supra* note 31, at 700, 710-12. *But see* Joseph H. King, *The Common Knowledge Exception to the Expert Testimony Requirement for Establishing the Standard of Care in Medical Malpractice*, 59 ALA. L. REV. 51 (2007). "[I]n order to be deemed qualified or 'competent' to offer an expert opinion on the relevant professional standard of care in a malpractice case, experts must typically pass muster in the three frames of reference and, in many jurisdictions, must also satisfy additional competency preconditions." *Id.* at 80.

the doctor's community. However, the rule applies only where the subject matter is too complex for jurors to understand and the jury alone cannot determine what the standard of care was that the physician should have abided by.

III. THE COMMON KNOWLEDGE EXCEPTION RELATING TO A MALPRACTICE CASE

In some cases where the plaintiff presents direct evidence⁵² of what practice the defendant did or did not follow, the law recognizes that a lay juror, without expert medical testimony, could conclude that the defendant failed to abide by common practice or the professional custom standard.⁵³ This rule of "common knowledge" is an exception to the expert witness rule required in most medical malpractice cases.⁵⁴ The "common knowledge" rule only applies in situations where the subject matter of the defendant doctor's conduct is within the common knowledge of laypersons or persons who are unfamiliar with the medical field.⁵⁵ In other words, this exception allows those who have no medical training whatsoever to determine, without expert testimony establishing the standard of care, that the

⁵² "Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." BLACK'S LAW DICTIONARY 16c (10th ed. 2014). The common knowledge doctrine is applied in cases where direct evidence of the defendant's behavior is given to the jury and based upon that the jury may conclude that the physician breached customary practice, without having been told by an expert what the customary practice was because such custom is clear to a layperson. This exception, however, does not afford the jury the opportunity to infer that such breach of custom caused the plaintiff's injuries (i.e., the jury cannot infer causation).

⁵³ "Common Knowledge Exception: The principle that lay testimony concerning routine or simple medical procedures is admissible to establish negligence in a medical-malpractice action." BLACK'S LAW DICTIONARY, *supra* note 52, at 1929. *See generally*, King, *supra* note 51.

⁵⁴ *Id.* at 61.

⁵⁵ *Id.* at 52.

Some cases warranting application of the common knowledge rule seem relatively straightforward. Consider, for instance, a situation in which it is alleged that a dentist extracts the wrong tooth, a veterinarian operates on the wrong horse, or a health care provider with responsibility for removing an instrument or device fails to remove it from inside the patient. Other cases fall at the other end of the spectrum and manifestly are not appropriately matters of common knowledge. An example might involve allegations that a surgeon was negligent in his decision to treat the plaintiff's injury with one surgical technique rather than another.

Id. at 52-53.

physician breached the customary practice because such breach is clear and intelligible to ordinary persons.⁵⁶ Furthermore, this doctrine does not allow the fact finder to infer causation from the physician's conduct, but instead, it relates only to the fact finder's conclusion that the defendant physician breached common practice.⁵⁷ Therefore, the fact finder is not permitted by "common knowledge" to find that the defendant doctor's departure from custom caused the injuries of the plaintiff, but only that the doctor's actions were a departure from the standard.⁵⁸

Suppose the plaintiff's witness, a nurse, testifies, "I was in the operating room and the surgeon was looking up at the ceiling because he said he thought he saw an insect, but he did not at that moment stop operating. His hands were still moving and cutting." In this situation, a court would likely rule that, without expert testimony, a jury could reasonably conclude that the physician's conduct was not common practice, because it is obvious that a doctor should not operate on a patient while failing to look at the operating site. A jury does not need to be told under these circumstances the standard to which the physician was bound because it is clear to any person that a physician should not look up at the ceiling while operating on a patient and continue to operate.⁵⁹ Stated otherwise, in some cases according to the law, a jury knows what is and what is not common practice.⁶⁰ However, the jury is not permitted to conclude that the physician's actions, which breached the custom standard, caused the injuries to

⁵⁶ *Id.* at 52.

⁵⁷ Mcconkey, *supra* note 6, at 500. *See also supra* Section II.A.

⁵⁸ *Id.* *See also* Mcconkey, *supra* note 6, at 500.

⁵⁹ The obvious inadequacy of the defendant physician's conduct to a layperson is what makes the "common knowledge" rule an exception to the "expert witness" rule. The jury on its own can see that the conduct of the physician could in no way have met any standard by which he was supposed to be bound, which is why no expert witness is needed to explain to the jury that in their opinion the defendant deviated from the standard.

⁶⁰ King, *supra* note 51, at 52.

The common knowledge rule holds that notwithstanding the general prerequisite for expert testimony to establish the standard of care and its breach in medical malpractice cases, such expert testimony is not required when the subject matter of the allegedly substandard conduct is within the common knowledge of non-medically-trained persons, or in other words, fully comprehensible to ordinary non-medical members of the public.

Id.

the plaintiff.⁶¹ Similarly, consider the situation where the plaintiff makes out a prima facie case without any expert witness by showing that the defendant physician performed surgery on the plaintiff while grossly intoxicated, near the point of unconsciousness.⁶² Under these circumstances it would be obvious to a lay juror, without expert testimony, that surgery on a patient should not be performed while one is under the influence of alcohol. In “common knowledge” cases, the jury is therefore told what the defendant doctor did, and solely based on that, the jury is aware that these actions fell below the common practice of physicians in that field of medicine.⁶³

Consider, on the other hand, the situation when the plaintiff alleges that the defendant physician committed malpractice by failing to prescribe oxygen for a patient in semi-acute congestive heart failure. Here, the plaintiff fails to make out a prima facie case unless she presents an expert witness who testifies that customary practice requires an oxygen prescription under that circumstance.⁶⁴ It would not be clear to an ordinary juror that failing to prescribe oxygen to a patient in such a condition would fall below the standard to which the doctor must abide, and therefore the “common knowledge” doctrine would not apply.

In *Brouwer v. Sisters of Charity Providence Hospitals*,⁶⁵ the court concluded that a lay juror could find that common practice is violated when a patient is exposed to a substance to which she has a known allergy.⁶⁶ In other words, the court found that it is within the “common knowledge” of a juror to determine that a physician was negligent when the physician knew about a patient’s latex allergy, yet

⁶¹ *Id.* This is because the jury only looks at the direct evidence of the defendant physician’s conduct under these circumstances and not circumstantial evidence where they may make an inference of causation. This is how the “common knowledge” exception is differentiated from “res ipsa loquitur.”

⁶² This is an illustration of the “common knowledge” doctrine allowing a plaintiff to prove that the defendant committed medical malpractice without the use of expert witness testimony, when the physician’s conduct is so clearly a breach of the standard to which he is bound. *See Id.* at 52-53.

⁶³ *Id.*

⁶⁴ This is an illustration of the “expert witness” rule requiring an expert witness to testify to the common practice among physicians in the defendant’s area of practice. *See Mcconkey, supra* note 6, at 499-500. It is here that the jury cannot on its own understand the complexities of medicine and know on its own the standard to which the physician is held. *Id.*

⁶⁵ 763 S.E.2d 200 (S.C. 2014).

⁶⁶ *Id.* at 204.

subsequently exposed the patient to that allergy and as a result, the patient suffered an allergic reaction.⁶⁷ Furthermore, in *Zamora v. Saint Vincent Hospital*,⁶⁸ the court held that it was “common knowledge” among lay people that failure of doctors to communicate a patient’s test results with each other was negligent because “[r]eaching a decision . . . does not require the factfinder to decide any medical issues; the communication in this instance is a clerical function.”⁶⁹ Here, a clerical duty, such as routinely relaying important information about a patient’s test results to a treating physician is considered within the juror’s common knowledge. The court stated that in “common knowledge” cases, negligence can be determined without expert testimony as to the standard of care because the knowledge possessed by lay persons is enough to inform them of such standard.⁷⁰ The court further emphasized this doctrine by explaining that the opposite is true in cases where the negligence of a doctor requires expert medical testimony because such knowledge is “peculiarly within the knowledge of doctors.”⁷¹ Here, the court draws the distinction between when expert testimony is required to explain the standard of care or custom which the physician was bound by, and when, because of “common knowledge,” an expert is not required because a layperson can ascertain by his ordinary intelligence that the physician’s conduct must have fallen below any standard.⁷² The court ultimately held that, “[a] reasonable patient understands that the radiologist who processes X-rays needs to communicate the results to the treating physician. Basic human communication, even between doctors, is not so far from common knowledge that it requires an expert’s testimony.”⁷³

Consequently, the “common knowledge” doctrine is an exception to the typical medical malpractice case in which expert testimony is required to state the standard of care which the defendant

⁶⁷ *Id.*

⁶⁸ 335 P.3d 1243 (N.M. 2014).

⁶⁹ *Id.* at 1250. “Communication between medical personnel is not a matter that requires expert knowledge to understand the standard of care involved. A party may be able to establish that a departure from the standard of ordinary care occurs when a clerical error affects the timeliness or accuracy of a diagnosis.” *Id.* at 1251.

⁷⁰ *Id.* at 1250.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Zamora*, 335 P.3d at 1252.

physician was bound. This exception allows the jury, without the expense and time of an expert witness, to conclude that based upon the physician's conduct, the physician's actions had fallen below the standard of care. The jurors use direct evidence to decide whether the custom standard was met without the use of an expert, and without drawing any inferences as to causation.

IV. RES IPSA LOQUITUR IN A MEDICAL MALPRACTICE CASE

As noted above, it is said that ordinarily, a lay juror is not qualified to know what is and what is not common practice.⁷⁴ However, the long standing negligence doctrine of "res ipsa loquitur"⁷⁵ [hereinafter "res ipsa"] provides that, in the absence of direct evidence⁷⁶ tending to show the defendant's negligent behavior,⁷⁷ a jury

⁷⁴ Let's note that, theoretically at least it is not the jury's ignorance of medicine and the human body and physiology that creates the necessity for an expert witness. Rather it is their unfamiliarity with what is common practice in a given medical situation.

⁷⁵ Res ipsa loquitur is Latin for "the thing speaks for itself." BLACK'S LAW DICTIONARY, *supra* note 52, at 17c.

The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes.

Id. (quoting STUART M. SPEISER, THE NEGLIGENCE CASE: RES IPSA LOQUITUR § 1:2, at 5-6 (1972)).

Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved.

Id. (quoting RESTATEMENT (THIRD) OF TORTS § 15 cmt. a (Discussion Draft 1999)).

⁷⁶ Note again that this is where the doctrine of "common knowledge" differs from "res ipsa loquitur." The common knowledge doctrine is applied in cases where direct evidence of the defendant's behavior is given to the jury and based upon that the jury may conclude that the physician breached customary practice. However, "res ipsa loquitur" provides instead that the jury may infer from circumstantial evidence that the physician must have committed negligent behavior and that the negligent behavior caused the injuries the plaintiff suffered.

⁷⁷ The word negligence has two meanings: it is the name of a cause of action for which a

may infer from circumstantial evidence⁷⁸ both that (a) the defendant did commit negligent behavior, and that (b) the negligent behavior caused the plaintiff's injury.⁷⁹ The doctrine of "res ipsa" in general provides that some amount of circumstantial evidence, as is so in every kind of litigation, is adequate for the plaintiff to make out a prima facie case and to overcome a nonsuit, such as a motion to dismiss for failure to state a cause of action.⁸⁰ More specifically, the doctrine

prima facie case requires duty, breach, damage and causation. To state that a defendant has a "duty" to plaintiff is to state that the defendant is obliged under the circumstances to behave as would a reasonably prudent person. If defendant breaches his duty then he fails to conform his conduct to that standard. It is also said, that when the defendant breaches his duty he commits "negligence," or that he has been "negligent." That usage represents the second meaning of "negligence."

⁷⁸ "Evidence based on inference and not on personal knowledge or observation." BLACK'S LAW DICTIONARY, *supra* note 52, at 18c.

⁷⁹ See N.Y. PATTERN JURY INSTR.—CIVIL NY PJI 2:65.

Res Ipsa Loquitur: The plaintiff must prove by the preponderance of the evidence that the defendant was negligent. The plaintiff may do this by circumstantial evidence, that is, by proving facts and circumstances from which negligence may be reasonably inferred. If the instrumentality causing the injury was in the exclusive control of the defendant, and if the circumstances surrounding the happening of the accident were of such a nature that in the ordinary course of events it would not have occurred if the person having control of the instrumentality had used reasonable care under the circumstances, the law permits, but does not require, you to infer negligence from the happening of the accident. The requirement of exclusive control is not rigid. It implies control by the defendant of such kind that the probability that the accident was caused by someone else is so remote that it is fair to permit an inference that the defendant was negligent. Thus, if you find by a preponderance of the evidence that the instrumentality causing the injury was, at the time of the injury, in the exclusive control of the defendant, and that the circumstances of the accident were such that in the ordinary course of events it would not have occurred if reasonable care had been used by the defendant, then you may infer that the defendant was negligent. However, if taking into consideration all of the evidence in the case you conclude that the accident was not due to any negligence on the defendant's part, then you will find for the defendant (on this issue).

Id. See also other states pattern jury instructions, such as Ohio Jury Instructions, 1 OJI-CV 401.33, and Arizona Pattern Jury Instructions, Civil Negligence 7, for the basic elements of this doctrine. 1 CV OHIO JURY INSTR. 401.33 (2014); ARIZ. PATTERN JURY INSTR.—CIVIL RAJI, NI 7 (2014).

⁸⁰ The quintessential and first case that recognized this doctrine was the famous "barrel of flour" case, *Byrne v. Boadle*, 159 Eng. Rep. 299 (Ex. 1863). In that case, a barrel of flour rolled out of defendant's warehouse window and hit the plaintiff who was walking on the street below. Plaintiff was knocked unconscious by the barrel and there were no witnesses who could say how the barrel ultimately fell on the plaintiff. The court held that the mere occurrence of the incident under these circumstances was itself enough evidence of negli-

recognizes that in some cases an unexpected event is itself sufficient evidence of malfeasance or misfeasance so as to allow a jury to return a plaintiff's verdict, where such an event would not occur absent some negligence.⁸¹

Properly, the doctrine of "res ipsa" should apply to a malpractice case only where, without direct evidence as to what the defendant did or did not do, the court decides that the jury can infer or conclude that the defendant physician failed to abide by common practice.⁸² So long as the "injury is of the type that does not normally occur in the absence of negligence, and the defendant exercised exclusive control over the instrumentalities that allegedly caused the injury, the jury may infer that the defendant was negligent."⁸³ For example, evidence shows that the patient underwent surgery in the region of the facial nerve and with an untoward result the facial nerve was cut. The plaintiff has no evidence or cannot obtain evidence of the physician's conduct at the time the facial nerve was cut. The plaintiff offers no evidence as to what the physician actually did or did not do as to cause the cutting of the facial nerve; for instance, no evidence shows that he was looking away or distracted at the time it happened. In addition, there is no evidence to show that he did not use extraordinary care to try and avoid the nerve. The plaintiff can only show that the defendant was his surgeon and that the facial nerve was cut. "Res ipsa" would apply to the case if the court were to find, on that evidence alone, that the jury could conclude that the defendant did not abide by common practice and that such failure to abide by the standard caused the plaintiff's injuries. Theoretically, that should be possible in some cases without an expert; however, some cases might require an expert to testify that this result or cutting of the nerve does

gence. *Id.* The court found that a barrel of flour could not roll out of a warehouse without some negligence. *Id.* So without evidence of how the defendant's barrel of flour fell out of his warehouse, he was considered negligent because the accident spoke for itself, and a barrel does not just fall out of a window without there being some form of negligence. *Id.*

⁸¹ *Id.* See also *Brumberg v. Cipriani USA, Inc.*, 973 N.Y.S.2d 401, 403 (App. Div. 3d Dep't 2013) (holding that "[r]es ipsa loquitur is neither a theory of liability nor a presumption of liability, but instead is simply a permitted inference that the trier of fact may accept or reject, reflecting a 'common-sense application of the probative value of circumstantial evidence' "); see also generally Kimberly Haag, Note, *Res Ipsa Loquitur: A Step along the Road to Liability Without Fault*, 42 BRANDEIS L.J. 149 (2003).

⁸² Haag, *supra* note 81, at 151-52.

⁸³ *Id.* at 152.

not ordinarily occur if the physician abides by common practice.⁸⁴

It is extraordinarily rare that a lay jury can determine that a violation of common practice has caused the plaintiff's injury since the injury must be one that does not normally occur without negligence, and as such must be an injury with which the jury has knowledge as to the common cause.⁸⁵ This is because the doctrine applies only when the actual cause of the accident is unknown and the jury may infer negligence from the circumstances of the accident as well as the doctor's relationship to such circumstances.⁸⁶ That is to say that "res ipsa" requires the accident to "speak for itself" to the jury so that it may reason that the doctor had to have caused the accident by negligent behavior, because such an action would not have occurred absence negligence.⁸⁷ As a result, "res ipsa" has been invoked only in certain narrow circumstances such as cases involving burns, improper patient positioning during surgery, and foreign objects being left in the patient's body.⁸⁸ Another example of when the doctrine is applicable is when a patient under anesthesia suffers an injury in an area separate from the operative site.⁸⁹ This is because such cases involve accidents which likely could not have occurred absent some negligence on the part of a medical professional.

For example, in *Ripley v. Lanzer*,⁹⁰ the patient argued that res ipsa applied to the case because the physician failed to "notice that a scalpel blade had detached from its handle and remained lodged in the [patient's] knee joint when he first closed the portals to the sur-

⁸⁴ "Res ipsa loquitur" involves sometimes both the common knowledge of the jury and expert testimony. For example, the New York Court of Appeals has held that in cases where the jury does not have the common knowledge and understanding of the medical issues presented, the plaintiff may use expert testimony to "bridge the gap" between the common knowledge the jury does possess and the common knowledge of physicians. See *Kambat v. St. Francis Hosp.*, 678 N.E.2d 456, 459 (N.Y. 1997); *States v. Lourdes Hosp.*, 792 N.E.2d 151, 153-54 (N.Y. 2003).

⁸⁵ See generally Karyn K. Albin, *Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*, 82 VA. L. REV. 325 (1996), for a comprehensive analysis of the history, application, and expansion of the doctrine.

⁸⁶ *Kambat*, 678 N.E.2d at 459.

⁸⁷ See *supra* note 79.

⁸⁸ See *Babits v. Vassar Bros. Hosp.*, 732 N.Y.S.2d 46 (App. Div. 2d Dep't 2001); *Thomas v. N.Y. Univ. Med. Ctr.*, 725 N.Y.S.2d 35 (App. Div. 1st Dep't 2001); *Delaney v. Champlain Valley Physicians Hosp. Med. Ctr.*, 648 N.Y.S.2d 761 (App. Div. 3d Dep't 1996).

⁸⁹ *Lourdes Hosp.*, 792 N.E.2d at 152.

⁹⁰ 215 P.3d 1020 (Wash. Ct. App. 2009).

gery site.”⁹¹ The patient argued that such an act in and of itself raised an inference of negligence under the doctrine, and that the inference of causation was shown by this circumstantial evidence.⁹² The court found that, “[the doctor] does not and could not argue that a surgeon who leaves a scalpel blade in a patient without noticing the blade is there and closes the surgical portals is doing something that ordinarily happens in the absence of negligence.”⁹³ Here, the court found, “the inference of negligence arises from ‘inadvertently leaving a foreign object [the blade] in a patient’s body [] after closing [the] surgical incision[s].’”⁹⁴ This case demonstrates the quintessential use of “res ipsa” in medical malpractice cases. It is obvious to a lay juror that when a part of a surgeon’s instrument is left at the surgical site and the surgical site is subsequently closed leaving the instrument in the patient’s body, that the defendant doctor was negligent in taking such action. It should be clear to the ordinary juror that absent negligence by the doctor and other healthcare providers present, a blade would not be left in the patient’s knee and that such a foreign object left in the patient’s body would cause the patient’s injury.

Overall, the doctrine of “res ipsa” allows a jury in certain cases to infer from circumstantial evidence that the defendant engaged in negligent conduct and that such negligent conduct caused the plaintiff’s injuries. This doctrine is typically invoked in cases where the cause of the accident is unknown and therefore only circumstantial evidence exists to explain the accident, and with such evidence the jury may infer negligence on the part of the physician because absent negligent conduct, the accident would not have occurred.

⁹¹ *Id.* at 1027.

⁹² *Id.*

⁹³ *Id.* at 1029.

⁹⁴ *Id.* at 1031. The physician had failed to notice the missing blade when he handed the handle back to the nurse and then closed the incisions before a sharps count was taken. *Ripley*, 215 P.3d at 1031. “Only after searching the operating room and taking an x-ray of [the patient’s] leg did [the physician] locate the missing blade.” *Id.* at 1032. “The facts as to what took place that resulted in [the failure to find the blade] are peculiarly within the knowledge of [the doctor].” *Id.* “These facts and the demands of justice require that a jury determine whether the inferences of negligence and causation that arise from these facts require the imposition of liability on [the physician]. No expert medical testimony was required to raise the inferences in this case.” *Id.*

V. JUDICIAL INCONSISTENCY IN APPLYING THE “COMMON KNOWLEDGE” AND “RES IPSA LOQUITUR” DOCTRINES

As previously discussed, the doctrines of “common knowledge” and “res ipsa loquitur” are separate and distinct principles of law in the realm of medical malpractice. While both rules base their findings on the custom standard to which a physician should adhere,⁹⁵ the requirements of both differ immensely. The “common knowledge” doctrine is an exception to the usual requirement for expert witness testimony in medical malpractice cases due to the typically complex nature of the subject matter.⁹⁶ This rule allows a jury to look at the direct evidence presented of the defendant’s conduct and find on its own that the defendant was negligent because such conduct could not have met a standard by which the doctor should be held accountable.⁹⁷ Unlike the “common knowledge” doctrine, the doctrine of “res ipsa” deals with circumstantial evidence, and it is not an exception to the “expert witness” rule because frequently, expert witnesses are still allowed or required to testify in such cases.⁹⁸ Furthermore, unlike “common knowledge,” “res ipsa” calls for the jury to take its analysis one step further and find that not only did the defendant clearly engage in negligent conduct based upon the circumstances surrounding the accident, but also that such conduct was the cause of the patient’s injuries.⁹⁹ It is important to note that these doctrines are distinguishable because both involve different forms of evidence to be used at trial. However, the intertwining language used to describe these doctrines in decisions can be confusing and can lead to unclear conclusions by the courts. In talking about these doctrines, the courts often do not clearly explain what each rule entails and how they differ, but instead they use language common to both doctrines which makes the distinctions ambiguous and ultimately leaves the reader with no understanding of the application of these rules.

For example, in *Brouwer*, the patient filed suit against the hospital for suffering an allergic reaction to latex during a routine

⁹⁵ Silver, *supra* note 3, at 1194.

⁹⁶ King, *supra* note 51, at 61-62.

⁹⁷ *Id.* at 52.

⁹⁸ *Supra* note 75; *see also* Seavers v. Methodist Med. Ctr. of Oak Ridge, 9 S.W.3d 86, 93 (Tenn. 2003).

⁹⁹ *Id.*

procedure to treat sleep apnea, which caused her to be placed in the Intensive Care Unit.¹⁰⁰ The language employed by this court, however, to discuss the “common knowledge” doctrine was confusing and misleading at times. The phrases used draw no distinction between the two separate doctrines of “res ipsa” and “common knowledge,” making it unclear when one applies and the other does not. The case discussed whether the plaintiff needed an expert witness in the case of a latex allergy.¹⁰¹ The court ultimately found that she did not because “in a common-knowledge case, whether a medical malpractice plaintiff’s claim meets the threshold of merit can be determined on the face of the complaint, and because the defendant’s careless acts are quite obvious, the plaintiff need not present expert testimony.”¹⁰² This language does nothing to explain the “common knowledge” doctrine and such language could likely apply to any case because it is virtually meaningless. The phrase “because the defendant’s careless acts are quite obvious” is an example of where courts need to refine and be precise in their writing about “common knowledge” or “res ipsa.” Generally, the obviousness of a situation is what makes the case fall under the doctrine of “res ipsa” and creates the inference that without negligence such an accident would not have happened. However, here the court is applying the “common knowledge” doctrine, yet using general language that makes it impossible to mark the distinctions between the two principles of law and determine when each is used. Most importantly, the terms used by this court do not make it clear that the “common knowledge” rule involves direct evidence and not circumstantial evidence. Thus, the court uses language that is vague and unclear.

Furthermore, in *Sokolsky v. Edelman*,¹⁰³ the court notes in a footnote, quoting *Toogood v. Rogal*,¹⁰⁴ that:

A very narrow exception to the requirement of expert testimony in medical malpractice actions applies where the matter is so simple or the lack of skill or care so obvious as to be within the range of experience and comprehension of even non-professional persons,

¹⁰⁰ *Brouwer*, 763 S.E.2d at 201-02.

¹⁰¹ *Id.* at 201.

¹⁰² *Id.* at 204.

¹⁰³ 93 A.3d 858 (Pa. Super. Ct. 2014).

¹⁰⁴ 824 A.2d 1140 (Pa. 2003).

also conceptualized as the doctrine of *res ipsa loquitur*.¹⁰⁵

The court uses this quote without further explaining the doctrine or its application. The language used by this court is not helpful in understanding the doctrine because the language used makes the doctrine sound exactly like the “common knowledge” doctrine. Courts should be careful with how they quote other courts and the specific language they use because this leads to misleading conclusions and misconceptions about the doctrines. Within the case it seems that all “res ipsa” requires is that the malpractice action involves an accident and circumstances which are within the common knowledge of lay persons. However, as previously explained, “res ipsa” is a relatively complex doctrine which states that the accident and circumstances speak for themselves and thus an inference of negligence on the part of the actor is appropriate.¹⁰⁶ Furthermore, it is not true that “res ipsa” is always an exception to the “expert witness” rule required in most cases. In many cases, the court finds that “res ipsa” may be applied even when expert testimony is required.¹⁰⁷ The definition and lack of explanation given by this court fail to mark the difference between “res ipsa” and “common knowledge” and instead mix the two distinct concepts together.

Unlike the above cases, the court in *Seavers* begins its discussion of the case by noting that “res ipsa” is a form of circumstantial evidence used to allow the jury to infer negligence from the circumstances of an injury, but not the injury alone.¹⁰⁸ This is because the injury alone is direct evidence of the physician’s conduct instead of circumstantial evidence surrounding the injury. The court further states that the doctrine is used when there is no direct evidence of the physician’s negligence.¹⁰⁹ All of the language used thus far distinguishes “res ipsa” from the “common knowledge” doctrine properly. The court ultimately concludes that, “the res ipsa doctrine is available in medical malpractice cases to raise an inference of negligence even if expert testimony is necessary to prove causation, the standard of care, and the fact that the injury does not ordinarily occur in the ab-

¹⁰⁵ *Sokolsky*, 93 A.3d at 863 n.2.

¹⁰⁶ BLACK’S LAW DICTIONARY, *supra* note 52, at 17c; *see also supra* Section IV.

¹⁰⁷ *Seavers*, 9 S.W.3d at 93.

¹⁰⁸ *Id.* at 91.

¹⁰⁹ *Id.*

sence of negligence.”¹¹⁰ The court further states that “res ipsa” may be used even where there is no “common knowledge” concerning the actual injury and surrounding circumstances.¹¹¹ The language used by this court is extremely helpful in understanding that the two doctrines are distinct and should be treated as such. The court here does an excellent job of explaining “res ipsa” and its application in medical malpractice cases. Instead of loosely using language and depending upon the reader to understand the subtle differences between the two rules, the court explicitly states the purpose of “res ipsa” as circumstantial evidence and the inferences to be made from such evidence.

Thus, while on the surface the doctrines seem straightforward, the language used by courts can confuse the different principles of law and ultimately conclude with language that is virtually meaningless. So while the “common knowledge” exception to expert medical testimony on its face seems clear and simple, the concept is actually a challenging one for courts that recognize the principle, but fail to give the doctrine a “meaningful definition or explication of the contours and nature of the rule and under what circumstances it applies.”¹¹² It is said that the “common knowledge” rule application is decided on a case-by-case basis depending upon the “eyes of the beholder[,] trial and appellate judges.”¹¹³ Such inconsistency in the application of the rule and unpredictability of when the rule will apply can unfortunately negatively influence the outcome of a case.¹¹⁴

¹¹⁰ *Id.* at 97.

¹¹¹ *Id.* at 94.

Claimants often have no knowledge of what happened during the course of medical treatment, aside from the fact that an injury occurred during that time. In cases where the standard of care or the nature of the injury requires the exposition of expert testimony, such testimony may be as probative of the existence of negligence as the common knowledge of lay persons. The use of expert testimony in that regard serves to bridge the gap between the jury's common knowledge and the complex subject matter that is “common” only to experts in a designated field. With the assistance of expert testimony, jurors can be made to understand the higher level of common knowledge and, after assessing the credibility of both the plaintiff's and defendant's experts, can decide whether to infer negligence from the evidence.

Seavers, 9 S.W.3d at 95.

¹¹² *King*, *supra* note 51, at 52.

¹¹³ *Id.* at 53.

¹¹⁴ *Id.* at 54.

On the other hand, health care providers who may be sued for medical malpractice may fear that the “common knowledge” doctrine puts them at a higher risk of being sued successfully because its application does not take into consideration all of the complexities of the practice of medicine.¹¹⁵ The rationale for this exception to the “expert witness” rule, which does not require expertise in certain circumstances to determine negligence, is valid,¹¹⁶ because the doctrine often affords the injured plaintiff the opportunity to save money by not having to retain an expert.¹¹⁷ However, the rule could have potentially devastating effects on society because doctors, in response to lawsuits and especially the threat of suits without reliance on medical experts, could force many to rely on defensive medicine, raising the costs of healthcare for many patients.¹¹⁸ Therefore, unfortunately, while the “common knowledge” exception may sometimes seem straightforward and helpful, the way in which it is applied is often times not predictable or sensible.¹¹⁹ Moreover, the uncertainty sur-

The cold reality remains that the decision whether the common knowledge rule applies will often determine the outcome of a negligence claim against a health care provider. If it is determined that the exception does not apply, then a plaintiff who has no qualified expert witness will often face a summary judgment or some other adverse pretrial disposition.

Id.

¹¹⁵ *Id.* at 83.

¹¹⁶ King, *supra* note 51, at 60-61.

¹¹⁷ *Id.* at 77.

¹¹⁸ *Id.* at 83-84, 104. *See also supra* note 2 and accompanying text.

¹¹⁹ King, *supra* note 51, at 72.

Application of the common knowledge exception has been unpredictable and inconsistent. This is a function of the dearth of meaningful guidance from the courts and the fact that the question is decided on a case-by-case basis, which together lead to highly subjective outcomes. The complicated factual sequence of events, the presence of multiple health care providers and often multiple defendants, and the fact that the subject medical care may extend over a prolonged period of time, all combine to make for highly individualized outcomes on the common knowledge question.

The divergence of outcomes of the cases is reflected not only in the substantial number of cases going both ways on the question, but can also be discerned among some ostensibly similar types of cases. Consider, for example, cases in which a patient suffered a fall arising in the medical setting (some fall cases may carry relatively high stakes). Numerous cases have held that the falls arising in the health care setting are within the common knowledge exception. Moreover, some of these cases arose in the context of complex medical procedures, such as during

rounding this doctrine has increasingly led to more appellate intervention, adding to the costs and time of medical malpractice litigation.¹²⁰

Conversely, the “res ipsa” doctrine has a different impact on the medical community. As a result of the “res ipsa” doctrine being used and applied in medical malpractice cases, plaintiffs who are injured often find it less difficult to get their case to the jury.¹²¹ Therefore, the use of this principle is likely beneficial for a large number of medical malpractice plaintiffs, and further, when “res ipsa” is used in conjunction with the “expert witness” rule, the two doctrines together may “create an unfair advantage against physicians.”¹²² Moreover, the doctrine may “provide an avenue for the jury to reach a result favoring the [injured] plaintiff based on feelings,”¹²³ because it gives the injured plaintiff “an opportunity to rely on circumstantial evidence in proving a case of negligence where there is insufficient direct evidence.”¹²⁴ In relying on circumstantial evidence the jury may

post-surgical care, or while a patient was hospitalized, or was being attended during a diagnostic procedure such as an MRI. Other cases, however, have held that the common knowledge exception did not apply to the facts presented in cases involving patient falls. Interestingly, some of these later cases may seem to arise in situations that strike one as less complex than some of those where the common knowledge rule was held to apply. For example, the court declined to apply the exception in a case in which an elderly resident of an assisted living facility fell while being assisted in dressing, and where a patient fell off a treadmill at the defendant’s rehabilitation center after she mistakenly set the speed of the treadmill too high. Some fall cases drawing different conclusions on the common knowledge question seem strikingly similar in terms of the health care setting.

Id. at 72-73.

¹²⁰ *Id.* at 84. However:

While a requirement for expert testimony admittedly may inhibit the growth of malpractice cases, there are also dangers in over-reliance on medical experts selected, paid, and prepared for trial by the parties. There are not only the obvious risks of bias and lack of objectivity, but also the danger that the outcome of cases may too often depend on the experts’ success in marketing their clients’ side, or, at least, in selectively presenting the case or obfuscating the medicine rather than in objectively educating the triers of fact and facilitating a just resolution of the matter.

Id.

¹²¹ Haag, *supra* note 81, at 149.

¹²² *Id.*

¹²³ *Id.* at 160.

¹²⁴ *Id.* at 156.

be more inclined to sympathize with the plaintiff by picturing themselves in the plaintiff's position, and the jurors can falsely assume the doctor is wealthy and can afford any resulting damages.¹²⁵

Further, jurors may misinterpret the "res ipsa" instruction given by a judge and "misconstrue [those] magical words."¹²⁶ Jurors could hear the instruction and immediately "give [res ipsa's] power to raise an inference too much weight,"¹²⁷ thereby causing juries to always apply the doctrine, even when the instruction is given to the jury as one of numerous other instructions they could choose to apply. Moreover:

As a result, confusion arising from a res ipsa loquitur instruction may increase a defendant's chance of being subject to a misguided decision. Thus, plaintiffs have a powerful weapon on their side, as the fact remains that plaintiffs who are allowed to present a res ipsa loquitur instruction to the jury seldom lose.¹²⁸

Unfortunately a "res ipsa" instruction given to the jury could often lead the jury to make the assumption that since something went wrong and the plaintiff was injured, it must have been as a result of the negligence of the doctor.¹²⁹ However, "bad results do not automatically warrant an inference of negligence."¹³⁰ The use of "res ipsa" in medical malpractice cases can also result in the imposition of strict liability for physicians.¹³¹ "To the extent strict liability flows from the risk of an erroneous verdict, defendant healthcare providers

¹²⁵ *Id.* at 160.

The use of res ipsa loquitur in a medical malpractice case allows jurors to justify many of these thoughts. When the trial court explains that under the law, negligence only has to be inferred, jurors might misunderstand the law to be that inferring negligence is different from actually proving it. Therefore, the use of res ipsa loquitur might provide an avenue for the jury to reach a result favoring the plaintiff based on feelings.

Haag, *supra* note 81, at 160.

¹²⁶ *Id.* at 159.

¹²⁷ *Id.*

¹²⁸ *Id.* at 159-60.

¹²⁹ *Id.* at 161.

¹³⁰ Haag, *supra* note 81, at 161. "In fact, the unfortunate outcomes in medical procedures are usually attributable to non-negligent misdiagnoses, unexpected reactions to medicine, or the inability of patients to withstand complex procedures—all factors that extend beyond a physician's control." *Id.*

¹³¹ *Id.*

face a degree of unfairness[, and] the application of *res ipsa loquitur* in medical malpractice cases may thus result in healthcare providers becoming insurers of good results.”¹³² Furthermore, as another scholar notes, the “*res ipsa*” instruction has just added “yet another weapon to a medical malpractice plaintiff’s arsenal” because it allows a plaintiff to avoid a nonsuit and request that the jury draw an inference of negligence against the defendant.¹³³

In sum, there is a lot of judicial inconsistency in the application of the two distinct doctrines of “*res ipsa*” and “common knowledge.” Courts persistently fail to distinguish the differences between the two principles of law in a meaningful and non-confusing way. The results of these court decisions are often misleading, and cause the two doctrines to be used sometimes interchangeably, when the use of one doctrine has completely different ramifications from the other.

VI. SOLUTIONS

As a result of the above discussion, it seems that the judiciary and the bar should be taking steps to maintain consistency in medical malpractice actions and employ language which is descriptive and distinct to each doctrine. Judges should be careful in writing decisions using either one of these doctrines because the language can get muddled and confusing for an outside reader, as well as for those directly affected by the decisions in the medical community, such as injured plaintiffs, defendant doctors, and everyday patients visiting their doctors under all circumstances.

One solution to this problem, as one scholar notes, is that “the common knowledge exception to the expert witness requirement should be retained, but subject to some guidelines and parameters defining its scope.”¹³⁴ This argument is bolstered by two alternative preconditions which would allow a court to hold that the “common knowledge” exception was applicable to the facts of the case.¹³⁵ The writer argues that either the defendant’s conduct could be legally performed by an unlicensed individual, or that the negligent conduct

¹³² *Id.*

¹³³ Albin, *supra* note 85, at 335.

¹³⁴ King, *supra* note 51, at 56-57.

¹³⁵ *Id.* at 56.

“did not involve the exercise of uniquely professional medical skills, a deliberate balancing of medical risks and benefits, or the exercise of therapeutic judgment.”¹³⁶ This system would allow the court to have discretion in deciding if one of the above two conditions is met to apply the “common knowledge” doctrine and permit a patient to proceed with his or her case without expert testimony as to the standard of care required by the doctor.¹³⁷ Moreover, the courts would be aided by this limitation on the application of the “common knowledge” doctrine because there would be more consistency in all medical malpractice cases involving this rule and therefore judges will be able to more precisely follow precedent. For plaintiffs injured by negligent doctors, this constrained rule would allow them to ascertain exactly when the “common knowledge” doctrine will be applied and thus prepare their cases according to clearer rules. This rule would also enable plaintiffs to plan ahead and know whether they will need to spend the money to hire an expert witness or not, and whether the case is then worth it to maintain. For defendant healthcare providers, they too will be able to determine precisely when the doctrine will apply in a case against them and plan their defenses accordingly. Furthermore, by limiting the use of the “common knowledge” doctrine, defendants will be able to more often rely upon expert witnesses for their defense, instead of deferring to a jury who may not understand the complexities of their field.

Unfortunately, application of this solution may still lead to inconsistent and vague decisions by the court. However, any rule limiting the “common knowledge” doctrine could be subject to inconsistencies because judges are human and imperfect. Likely, this limiting procedure would help prevent the “common knowledge” exception to the “expert witness” rule from being abused and arbitrarily applied. It might help make it more clear to all persons affected by medical malpractice litigation, when exactly the doctrine would be applicable. Furthermore, even if the solution is not perfect, it may nevertheless be an improvement to the procedures in use today. While inconsistencies are possible, it is also possible that there will be fewer inconsistencies in judgments if this rule is applied and the “common knowledge” doctrine is limited.

In addition, another writer argues that the application of “res

¹³⁶ *Id.*

¹³⁷ *Id.* at 57.

ipsa” should also be limited greatly.¹³⁸ It is said that perhaps “res ipsa” should not be used in cases where the injured patient is able to already establish a prima facie case of negligence based on circumstantial evidence apart from the injury itself.¹³⁹ In these circumstances, it is argued that the plaintiff should only receive a circumstantial evidence jury instruction allowing the jury to infer negligence from the surrounding events of the injury, but not actually receive a “res ipsa” instruction because it prejudices the defendant greatly.¹⁴⁰ The difference between receiving the “res ipsa” jury instruction and just being allowed to infer negligence is simply whether the jury specifically hears the Latin phrase, which usually results in “res ipsa” being applied even where it may be inappropriate.¹⁴¹ Therefore, the main problem with the “res ipsa” instruction is that the plaintiff’s attorney may request such an instruction and then when given, the jury is able to choose whether to apply the doctrine or not, based upon the circumstantial evidence presented. However, this poses a complication to the judicial process because often, immediately when jurors hear the magic words “res ipsa,” they apply the doctrine without considering whether it is appropriate under the circumstances.

Furthermore, it is argued that in cases where the injury requires expert witness testimony and there is no circumstantial evidence of negligence apart from the injury, “res ipsa” should not be used. This argument is rationalized by the notion that the requirement of an expert witness does not allow the accident to speak for itself and determine that there must have been negligence because there is no other explanation for such events occurring.¹⁴² Moreover, in cases where there is conflicting expert evidence, it is again argued that “res ipsa” should not be used to avoid a jury arbitrarily making a

¹³⁸ Albin, *supra* note 85, at 349-51.

¹³⁹ *Id.* at 349. In other words, where the plaintiff shows evidence of negligence based upon the occurrence of the injury, not the injury itself, he should be allowed to receive the instruction. *Id.* However, the latter use seems to make the possible reach of the doctrine too broad.

¹⁴⁰ *Id.* at 350.

¹⁴¹ Haag, *supra* note 81, at 159. The problem with giving the “res ipsa” instruction is it gives the jury a choice of whether to apply such an instruction or not, and it is argued that hearing those three Latin words often prejudices the defendant in such circumstances because just the utterance of those words can make the jury believe they must apply the doctrine. *Id.*

¹⁴² Albin, *supra* note 85, at 350.

choice between which expert it likes better.¹⁴³ Finally, it is thought that where there is no circumstantial evidence of negligence except the injury itself, and where the injury is within the intelligence of a layperson, meaning no expert medical testimony is required, “res ipsa” should be used to allow the jury to decide whether the defendant did or did not act negligently.¹⁴⁴

The legal effect of “res ipsa” never being used would be that the jury would never be able to get an instruction allowing them to infer negligence from the defendant’s conduct and the circumstances surrounding the injury. This means that only direct evidence of the defendant’s conduct that injured the plaintiff would be sufficient to bring a medical malpractice claim. While “res ipsa” is only invoked in a small number of cases dealing with clear and obvious injuries that likely would not occur without a doctor acting negligently,¹⁴⁵ when this instruction is used, it often leads the jury to take the Latin words as extremely powerful and assume it must be applied.¹⁴⁶ Furthermore, the doctrine is not consistently applied in all jurisdictions, leading to confusing decisions for both injured plaintiffs and healthcare providers who are sued.¹⁴⁷ However, if this doctrine is limited it might result in fewer plaintiffs succeeding at trial, because those that go to trial with a “res ipsa” instruction usually win.¹⁴⁸ Thus, while limiting the doctrine might help address the inconsistencies, it may then make the realm of medical malpractice unfair and inaccessible to plaintiffs. Regrettably, the doctrine is already used in a limited number of circumstances and yet there is still much debate and confusion about when “res ipsa” should actually apply.

A final solution would be to completely eliminate the doctrines of “res ipsa” and “common knowledge,” as well as the “expert witness” rule, and return to the ordinary negligence standard upon which we hold all other persons, except physicians, accountable.¹⁴⁹ Instead of separating medical malpractice from ordinary negligence, the distinction could be erased and instead plaintiffs and defendants

¹⁴³ *Id.* at 350-51.

¹⁴⁴ *Id.* at 351.

¹⁴⁵ *See supra* note 79.

¹⁴⁶ *See supra* note 88.

¹⁴⁷ *See supra* Section IV.

¹⁴⁸ Haag, *supra* note 81, at 161.

¹⁴⁹ Silver, *supra* note 3, at 1218.

would need to provide juries with experts who can testify as to the risks and benefits at issue in each medical case.¹⁵⁰ Under this change, the jury would need to determine whether the doctor had acted with reasonable care in treating the patient, and not whether he met the custom standard.¹⁵¹ This solution might be useful because it will result in consistency for all negligence matters and it may be simpler for the jury to understand. Furthermore, this reversion back to the original standard would give parties a clearer understanding of what laws are applicable in their cases and make medical negligence cases more predictable for all involved. However, in the United States there is already an established system in place for medical malpractice claims and eliminating the system entirely may have negative repercussions for those who are currently involved in suits.

Alternatively, another solution would be to keep the medical malpractice standard that currently exists, yet eliminate the exceptions to the doctrine and always require expert witnesses in those cases. Unfortunately, while this may seem like a good resolution to the problem of inconsistency in medical malpractice cases, eliminating these doctrines may just have the effect of judges still applying these principles, but without any guidelines. Furthermore, the issue of expert witness battles would become an even more prevalent problem if experts were required in all cases. Therefore, while eliminating the medical malpractice standard and doctrines may in the long run fix the problems associated with these cases, it may be more trouble than it is ultimately worth.

Thus, the best solution to fixing these inconsistencies would be to have stricter guidelines in place for both the “common knowledge” and “res ipsa” doctrines. Following these suggestions would allow for the limited use of these doctrines and therefore a clearer understanding of when each doctrine is applicable. Finding a solution is imperative to changing the way medical malpractice cases operate and allowing both plaintiffs and defendants to better understand and predict how their cases may play out.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

VII. CONCLUSION

It is important that courts remain consistent in their application of medical malpractice rules and principles, such as “common knowledge” and “res ipsa,” to ensure fair and just outcomes for both plaintiffs who suffer as a result of a doctor’s negligence and doctors who abide by the proper standard of care when treating patients. Since we are living in a world where there are such a large number of malpractice claims brought against medical professionals each year, it is imperative that both patients and doctors have a fair chance at litigating these claims and are aware of the different doctrines used in these specific cases. To ensure this, courts and attorneys must clearly distinguish the differences between these doctrines and write decisions which are unambiguous in their application of the doctrines. Unfortunately, these malpractice claims directly influence how patients and doctors interact today, which is why it is so important to make certain that these doctrines are used properly and in a way that is understandable to the medical community they influence.