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Res Ipsa Loquitor: Does it Really "Speak for Itself" or are Plaintiffs Using it to Shift Their Burden of Proof?

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Res Ipsa Loquitor ("RIL") for many years felt like an outdated doctrine you learned about in law school and only saw a handful of times in practice. Now it seems to be trending more than Kim Kardashian's law career. Recently, in medical malpractice cases specifically, plaintiff attorneys are pleading *RIL* as a separate count – almost as a backup plan – in an effort to shift the burden entirely to defendants.

So, what really is *RIL*, and can it be a substitute for plaintiffs to use when they cannot establish proximate cause? And, as is paramount, how do you defend against it?

RIL is Latin for "the thing speaks for itself." In civil cases, this is a substitute for proving negligence if the event could not have happened but for negligence. The classic case of *RIL* in the medical malpractice context is a sponge left in a patient following surgery – even if no one knows how the sponge got left in the patient, it gets left there only if someone is negligent. However, plaintiff attorneys have been attempting to widen *RIL*'s application to include cases simply when a fact or event is unknown or even as an explanation for a bad medical outcome.

Plaintiff attorneys are pleading *RIL* more frequently of late, which is consistent with the plaintiff bar's push to lower their burden of proof in negligence matters (i.e., relation back doctrine, expert qualifications, vicarious liability)

Of course, being able to argue to a jury that "this only occurs if someone is negligent" makes plaintiffs' job exponentially easier. If successful, essentially relieves plaintiffs of their burden of proof in establishing there was a breach of the standard of care and proximate cause and shifts the burden – almost entirely - to defendants to disprove their claim.

Despite plaintiffs' complaints frequently pleading *RIL* as a separate claim, it is actually not an independent cause of action.[1] Rather, it is an inference of negligence. Under the doctrine of *RIL*, an inference of negligence can arise when the plaintiff's injury: (1) ordina*rily* would not have occurred in the absence of negligence, (2) was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) was not due to any voluntary action or contribution of the plaintiff.[2]

The fact of a bad medical result itself is insufficient to satisfy the first element of *RIL*.[3] The mere possibility that a breach of duty by defendant caused plaintiff to sustain injuries is not sufficient to establish causation or to apply the doctrine of *RIL*.[4]

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Sarah is a Partner with the firm. Her practice is focused on medical malpractice defense and professional liability.

Sarah's medical malpractice defense practice spans a broad range of medical specialties, including but not limited to emergency medicine, anesthesiology, general surgery, gastroenterology, radiology, interventional radiology, family medicine, hospitalists, pathology, cardiology, plastic surgery, hand surgery, neurology, and obstetrics. She represents hospital systems, physician groups, insurance companies, physicians (across all specialties), nurses, and mid-level providers, including physician assistants, nurse practitioners, CRNAs, and CAAs.

Sarah is a litigation attorney with experience in complex medical malpractice trials. In addition to trials, she enjoys handling complicated expert depositions, *Daubert* hearings, and complex damages claims.

Whenever she is assigned a new matter, Sarah immediately strategizes how she can get the case dismissed or minimize damages. This strategy is implemented and reassessed throughout every phase of litigation, with the ultimate goal of client satisfaction.

Before joining Foley, Baron, Metzger & Juip, Sarah was a Partner at a metro-Detroit law firm where she practiced medical malpractice defense. Earlier in her career, Sarah practiced commercial litigation, including the defense of a mortgage company in a wide range of matters, as well as work on mergers and acquisitions.

Sarah is a board member of the Michigan Defense Trial Counsel (MDTC), an association of leading defense attorneys in the State of Michigan and sits on a variety of the organization's committees. She was the recipient of the Anita L. Comorski Volunteer of the Year Award in 2023 in recognition of her generous contributions to the mission and goals of the MDTC.

Despite Michigan medical malpractice laws to the contrary, *RIL* is being used by plaintiffs as a tool to apply strict liability.[5]

This inference of negligence is exactly what makes a claim of *RIL* dangerous to have pending at the time of trial. This inference, and instructions with respect to it, essentially signals to the jury that because the outcome occurred then negligence must have also occurred. The jury instruction for *RIL* would be read after the submission of proofs and right before jury deliberations. This jury instruction may cause a jury to essentially ignore defendant's proofs and find negligence – something akin to strict liability. As an example, the jury instruction pertinent to a medical malpractice case sets forth the following:

> If you find that the defendant had control over the [body of the plaintiff/ instrumentality which caused the plaintiff's injury], and that the plaintiff's injury is of a kind which does not ordina*rily* occur without someone's negligence, then you may infer that the defendant was negligent.
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> However, you should weigh all of the evidence in this case in determining whether the defendant was negligent and whether that negligence was a proximate cause of plaintiff's injury.[6]

It is imperative that medical malpractice defense attorneys understand *RIL* before a case begins so that you can successfully implement your defense strategy. Your defense strategy will start with your first responsive pleadings and making sure you address this *RIL* "claim" in your affirmative defenses. During the depositions of the plaintiff and other witnesses, you will want to inquire as to whether (1) the event was caused by an agency or instrumentality within the exclusive control of the defendant and (2) there was any voluntary action or contribution of the plaintiff. These inquiries will develop an important record with respect to the second and third *RIL* factors.

After lay witnesses have been deposed, you will need to prepare for the depositions of plaintiff's experts. You should start with researching the incident rates in which the at-issue event occurs and preserve any relevant case studies and literature regarding the frequency of these incidences. When you depose plaintiff's experts you should obtain testimony about whether they (1) agree that the at-issue event could occur absent any negligence and (2) have any experience of the event occurring absent any negligence. You will want to make sure you have a clear transcript before ending the deposition as you will need to rely on the transcript for the next step.

Next, after you have deposed all of plaintiff's experts, you should file a motion to strike plaintiff's claim for *RIL* or for summary disposition pursuant to MCR 2.116(C)(8) and (10) and cite plaintiff's experts' admissions (if you can secure them) that such event could occur absent any negligence, along with any admissions and record support to rebut the other two elements. Even if the Court does not grant your motion, you may raise it again at the close of plaintiff's proofs at trial as a motion for directed verdict and/or have a preserved appellate issue.

If plaintiffs continue to push the bounds of *RIL* and undermine long standing laws and medical malpractice statutes and customs, what will come of the defense of medical malpractice claims? Will defendants be found liable simply because there was a bad outcome? Will this slippery slope eventually lead us to quasi strict liability in negligence claims? These questions and concerns are exactly why defense attorneys should certainly be on the look out for these claims even if they are not specifically set forth in plaintiff's Complaint.

Although Michigan law does not permit "trial by surprise,"[7] plaintiff attorneys may be able to convince a judge that they have established the elements of *RIL* during the case to date and should be entitled to the inference at trial. To avoid ending up with this *RIL* inference at trial, defense attorneys will want to evaluate each case from the moment it arrives on their desk and strategically work them up along the lines outlined in this article. That way, a dispositive motion or a motion to strike can be filed timely before trial.

Defense attorneys will need to collaborate and aggressively pursue the defense of *RIL* claims in order to protect the integrity of the justice system and be able to defend our clients within the bounds of the long-standing laws which explicitly place the burden of proof on the plaintiff.[8]

Endnotes

1 *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987).

2 *Woodard v Custer*, 473 Mich 1, 7; 702 NW2d 522 (2005); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 193-94; 540 NW2d 297 (1995).

3 *Locke v Pachtman*, 446 Mich 216, 230-31; 521 NW2d 786 (1994).

4 *Berryman v Kmart Corp*, 193 Mich App 88, 92; 483 NW2d 642 (1992); Cloverleaf Car Co, 213 Mich App at 194.

5 *Bryant v Oakpointe Villa Nursing Ctr*, Inc, 471 Mich 411, 425-26; 684 NW2d 864 (2004).

6 M Civ JI 30.05

7 *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987).

8 *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995); *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003); *Craig v Oakwood Hosp*, 471 Mich 67, 87-88; 674 NW2d 296 (2004); *Woodard v Custer*, 473 Mich 1, 6; 702 NW2d 522 (2005).