. . . A review of the record, including the depositions, reveals evidence from which conflicting inferences could be drawn both as to whether Maimone was acting incidental to or within the scope of his employment when he moved his trailer for temporary personal use and whether the defendant was independently negligent in supervising Maimone and in inspecting his truck and his trailer. We conclude that neither party is entitled to judgment as a matter of law on either the plaintiff's *respondeat superior* or negligent supervision claims. We reverse the trial court's granting of the defendant's motion for summary judgment and remand.

NOTES TO TRAHAN-LAROCHE v. LOCKHEED SANDERS, INC.

1. ***Elements of* Respondeat Superior.** The basic definition of the *respondeat superior* doctrine is straightforward. An employer will be liable for the torts of an employee committed within the scope of employment. What allegations did the plaintiff make to establish those elements?

2. ***Negligent Supervision.*** To obtain a judgment against an employer under the *respondeat superior* doctrine, the plaintiff must show that the employee acted negligently. There is no requirement that the plaintiff show anything about the employer's conduct other than the employer's participation in the employer-employee relationship. In contrast, in the tort action for negligent supervision, a plaintiff seeks damages from an employer on the theory that the employer was negligent in supervising an employee. To win a judgment on that theory, a plaintiff must show that the employer's supervision was worse than the supervision a reasonable employer would have provided.

3. ***Practical Effect of* Respondeat Superior.** A plaintiff who wins a judgment in a *respondeat superior* case can enforce the judgment against the employer. The plaintiff is also entitled to a judgment against the employee. The doctrine's practical effect is to supply a "deep pocket" to the injured plaintiff. In general, employers are more capable than employees of paying tort judgments.

4. ***Contribution and Indemnification.*** The obvious difference between vicarious liability and other cases of apportioned liability discussed in this chapter is that in those other cases, each of the multiple liable defendants acted tortiously. Vicarious liability is imposed on a defendant, the employer, who did not act tortiously. A defendant in a joint tortfeasor case who pays more than his or her share of the damages for which the defendant was jointly and severally liable is usually allowed to sue other defendants for contribution. Under vicarious liability for an employee's negligence, most states hold that there can be no right to contribution between employer and employee:

> The rules of vicarious liability respond to a specific need in the law of torts: how to fully compensate an injury caused by the act of a *single* tortfeasor. . . . [A] principal whose liability rests solely upon the doctrine of *respondeat superior* and not upon any independent act of the principal is not a joint tortfeasor with the agent from whose conduct the principal's liability is derived. . . . [T]he principal is not a tortfeasor in the true sense of the word because he is not [necessarily] independently liable based upon his own independent actionable fault. . . . Consequently, there is no right of contribution, only indemnification.

See Alvarez v. New Haven Register Inc., 249 Conn. 709, 720-721, 735 A.2d 306 (1999).

Indemnification is a defendant's right to full compensation for all damages paid due to the tortious conduct of some other actor. In some states, an employer may sue the employee to recover all of the damages the employer paid because of the relationship between them. This rule shifts liability from a passive employer who was not proved to have acted negligently to the active employee who acted tortiously. In other states, an employer is entitled to indemnification from an employee only if the employee's conduct was characterized as reckless or intentional.

Perspective: Rationale for Respondeat Superior

A number of theories justify the *respondeat superior* doctrine. The *deep pocket theory,* which ensures that a plaintiff can sue someone who is likely to have assets or insurance, is the most commonly cited justification. A second is the *risk spreading theory.* According to this theory, the employer is better situated than either the employee or the plaintiff to cover the loss by reimbursing itself through higher prices to its customer or by accumulating reserves in advance of an accident (perhaps through insurance). A third theory is the *enterprise risk theory.* This theory reflects the view that even though an employer was not at fault for the way in which it engaged in a particular activity, the activity ought, nevertheless, pay its own way by paying for the risks it creates. If tortious employee conduct is one of the foreseeable risks, the enterprise should pay for those risks that are characteristic of its activity. A fourth perspective is the *risk avoidance theory,* which argues that if an employer is required to pay for the tortious acts of its employees (or the resulting higher insurance premiums), it will have an incentive to discover ways to minimize those acts and thereby minimize harm. Understanding the theoretical foundations of vicarious liability (and other legal doctrines) helps lawyers argue cases for their clients. By recognizing these justifications for imposing vicarious liability, lawyers may argue that no persuasive justification exists for liability in a particular case where the employment status of the tortfeasor is not obvious.

O'CONNOR v. McDONALD'S RESTAURANTS OF CALIFORNIA, INC.

269 Cal. Rptr. 101 (Cal. Ct. App. 1990)

KREMER, P.J.

Plaintiff Martin O'Connor appeals summary judgment favoring defendants McDonald's Restaurants of California, Inc., and McDonald's Corporation (together McDonald's) on his complaint for damages for personal injuries on a theory of McDonald's vicarious liability for the negligence of its employee Evans. O'Connor, injured when his motorcycle collided with an automobile driven by Evans, contends the superior court erred in determining Evans had completely departed from a special errand on behalf of McDonald's and was not acting within the scope of his employment at the time of the accident. . . .

In reviewing the propriety of the summary judgment, we state the facts in the light most favorable to O'Connor.

From about 8 p.m. on August 12, 1982, until between 1 a.m. and 2 a.m. the next day, Evans and several McDonald's co-workers scoured the children's playground area of McDonald's San Ysidro restaurant. The special cleaning prepared the restaurant for inspection as part of McDonald's "spring-blitz" competition. Evans — who aspired to a managerial position — worked without pay in the cleanup party at McDonald's request. Evans's voluntary contribution of work and time is the type of extra effort leading to advancement in McDonald's organization.

After completing the cleanup, Evans and four fellow workers went to the house of McDonald's employee Duffer. Duffer had also participated in the evening's work. At Duffer's house, Evans and the others talked shop and socialized into the early hours of the morning. About 6:30 a.m., as Evans drove from Duffer's house toward his own home, his automobile collided with O'Connor's motorcycle.

O'Connor filed a lawsuit for negligence against Evans, McDonald's and others. O'Connor complained of serious injuries resulting in permanent disability and the loss of his left leg below the knee. The suit claimed McDonald's was liable for negligence on a theory of *respondeat superior.*

Essentially, O'Connor claimed Evans was on a "special errand" for his employer McDonald's when he worked on the spring-blitz clean-up on his own time. According to O'Connor, if Evans were on a special errand, then his driving would be exempt from the "going and coming" rule by which an employer ordinarily is not liable for an employee's negligence while commuting.[9] Under O'Connor's theory, the special errand began when Evans left his own home and continued until he returned home.

McDonald's sought summary judgment, contending as a matter of law Evans was acting outside the scope of his employment at the time of the accident.

The superior court found Evans was on a special errand for McDonald's when he voluntarily reported for cleanup duties at the San Ysidro restaurant. However, the superior court further found Evans's stop at Duffer's house was a "complete departure" from his special errand. Thus, the court concluded any responsibility of McDonald's for Evans's driving terminated before the accident. The court granted summary judgment for McDonald's. O'Connor appeals.

The central issue before us is of some antiquity. In 1834 Baron Parke addressed the issue:

> The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic

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[9] "Generally, an employee is outside the scope of his employment while engaged in his ordinary commute to and from his place of work. [Citation.] This principle is known as the going-and-coming rule and is based on the theory that the employment relationship is suspended from the time the employee leaves his job until he returns and on the theory that during the normal everyday commute, the employee is not rendering services directly or indirectly to his employer. [Citation.]" "(Felix v. Asai, [192 Cal. App. 3d 926, 931, 237 Cal. Rptr. 718 (1987)]."

However, when "the employee is traveling from his residence or returning to it as part of his usual duties or at the specific request or order of his employer, he is considered to be on a special errand for his employer and thus acting within the scope of his employment. [Citations.]" (Robbins v. Hewlett-Packard Corp. (1972) 26 Cal. App. 3d 489, 494, 103 Cal. Rptr. 184.)

of his own, without being at all on his master's business, the master will not be liable. (Joel v. Morison (1834) 6 Car. & P. 501, 503, 172 Eng. Rep. 1338, 1339.)

Unfortunately, as an academic commentator observed in 1923, "It is relatively simple to state that the master is responsible for his servant's torts only when the latter is engaged in the master's business, or doing the master's work, or acting within the scope of his employment; but to determine in a particular case whether the servant's act falls within or without the operation of the rule presents a more difficult task." (Smith, *Frolic and Detour* (1923) 23 Colum. L. Rev. 444, 463.)

Here we must determine whether the superior court properly concluded as a matter of law that Evans's activity in attending the gathering at Duffer's house constituted a complete departure from a special errand for McDonald's (a frolic of his own) rather than a mere deviation (a detour).

Whether there has been a deviation so material as to constitute a complete departure by an employee from the course of his employment so as to release employer from liability for employee's negligence, is usually a question of fact.

"In determining whether an employee has completely abandoned pursuit of a business errand for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include the intent of the employee, the nature, time and place of the employee's conduct, the work the employee was hired to do, the incidental acts the employer should reasonably have expected the employee to do, the amount of freedom allowed the employee in performing his duties, and the amount of time consumed in the personal activity. [Citations.] While the question of whether an employee has departed from his special errand is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law. [Citations.]" (Felix v. Asai, supra, 192 Cal. App. 3d at pp.932-933, 237 Cal. Rptr. 718.)

Here the evidence does not clearly show complete abandonment. Instead, the evidence raises triable issues on the factors bearing on whether Evans completely abandoned the special errand in favor of pursuing a personal objective.

A. Evans's Intent. In its motion for summary judgment, McDonald's did not identify any evidence Evans intended to abandon his special errand when he decided to join his co-workers in the gathering at Duffer's house. However, in opposing McDonald's motion, O'Connor presented evidence bearing on Evans's intent from which a jury might reasonably infer Evans did not completely abandon his special errand when he went to Duffer's house.

The record contains evidence McDonald's encourages its employees and aspiring managers to show greater dedication than simply working a shift and going home. O'Connor presented McDonald's operations and training manual and employee handbook to demonstrate McDonald's fosters employee initiative and involvement in problem solving. Such evidence could reasonably support a finding of "a direct and specific connection" between McDonald's business and the gathering at Duffer's because the gathering was consistent with the "family" spirit and teamwork emphasized by McDonald's in its communications with employees. Such evidence could also reasonably support a finding McDonald's emphasis on teamwork made a group discussion of McDonald's business at Duffer's house a foreseeable continuation of Evans's special errand. The record also contains evidence supporting a reasonable inference

Evans went to Duffer's house intending to continue his work on the spring blitz for McDonald's. Much of the conversation during the gathering centered on McDonald's business or concerned employee-manager relations. A "main inspection" was scheduled for the day after the spring-blitz cleanup of the playground area. The persons at Duffer's house continued their mental inventory of last minute things they could do to improve their chances in the spring-blitz competition. According to Evans, the group was concerned about whether "we were going to win [the spring blitz], and we did." The group discussed the cleaning activities of the spring blitz to determine whether they might return to the restaurant to correct any deficiencies. According to Duffer, the activity during the gathering at his house consisted of "sitting around talking about the blitz and relaxing." The group also "talked about other stores, how they had been doing [and] about passing the quality checks that we had or spot checks that we had."

Thus, evidence and reasonable inferences bearing on Evans's intent raises triable factual issues about whether he completely abandoned the special errand.

B. Nature, Time and Place of Evans's Conduct. McDonald's contends the gathering at Duffer's house after normal business hours was an informal social function unconnected to Evans's special errand for his employer. However, O'Connor submitted evidence suggesting the gathering benefitted McDonald's, occurred at Evans's fellow employee's house immediately after McDonald's place of business closed, consisted of continuation of employees' discussion about the spring blitz, and was inspired by the spirit of competition engendered by McDonald's. That evidence and reasonable inferences bearing on the nature, time and place of Evans's conduct raise triable factual issues about whether he completely abandoned the special errand.

C. Work Evans Was Hired to Do. McDonald's contends the asserted managerial discussions at Duffer's house went beyond the scope of work Evans was hired to do. However, O'Connor introduced evidence suggesting Evans was in training to become a manager and was expected to show initiative in his work to be worthy of future promotion. Such evidence raises an inference Evans's participation in discussions at Duffer's house did not exceed the scope of his assigned work.

D. McDonald's Reasonable Expectations. In a declaration supporting McDonald's motion for summary judgment, Evans's direct supervisor Cardenas asserted Evans "was under no instruction from me, or any other authorized employee of McDONALD'S, with respect to his activities after he left the restaurant. . . . I had no knowledge that other co-employees would go to Joe Duffer's house after the final clean-up." McDonald's also presented evidence it required official employee conferences be attended by a salaried manager and no such salaried manager attended the Duffer gathering. However, these facts do not compel a finding as a matter of law contrary to O'Connor's claim McDonald's implicitly encouraged Evans to continue his special errand by conferring with co-employees on what they might do to win the spring-blitz competition.

E. Evans's Freedom in Performing Duties. O'Connor presented evidence Evans had considerable latitude in performing his duties. Evans was not paid for his performance of the special errand. His work was voluntary and consistent with other occasions where he and fellow workers were expected to pitch in to help the team effort without punching in on the time clock.

F. Amount of Time Consumed in Personal Activity. McDonald's contends Evans stopped at Duffer's home for four hours on his own volition, for his own enjoyment and without McDonald's explicit direction or suggestion. However, O'Connor presented evidence showing much of the discussion at Duffer's home was related to Evans's employment at McDonald's. Such evidence raises a triable factual issue about the combination of personal entertainment and company business at Duffer's house. "Where the employee may be deemed to be pursuing a business errand and a personal objective simultaneously, he will still be acting within the scope of his employment." (Felix v. Asai, supra, 192 Cal. App. 3d at p.932, 237 Cal. Rptr. 718.)

G. Conclusion. The superior court found—and the parties here do not challenge—Evans's voluntary participation in the spring blitz until after midnight constituted a special errand on McDonald's behalf. The question here is whether the gathering at Duffer's to discuss the spring blitz and socialize constituted a complete departure from the special errand.

Because disputed factual questions and reasonable inferences preclude determination as a matter of law of the issue whether Evans completely abandoned his special errand, the court should have denied McDonald's motion for summary judgment. . . .

NOTES TO O'CONNOR v. McDONALD'S RESTAURANTS OF CALIFORNIA, INC.

1. *Scope of Employment.* Courts use many terms in analyzing whether an employee acted within the scope of employment at the time of tortious conduct. Terminology includes references to "frolics," "detours," "comings and goings," "special errands," and "complete abandonment of special errands." In which of these circumstances is the employer potentially vicariously liable? What evidence supported vicarious liability in *McDonald's?*

2. *Alternative Tests for Scope of Employment.* Jurisdictions consider a variety of factors relevant to whether an employee is acting within the scope of employment. Some follow the test from §228 of the Restatement (Second) of Agency, which provides:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Another approach emphasizes whether the employee's tortious conduct was foreseeable in light of the duties the employee was hired to perform. Foreseeability in this context means

> that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other

> costs of the employer's business. In other words, where the question is one of vicarious liability, the inquiry should be whether the risk was one "that may fairly be regarded as typical of or broadly incidental" to the enterprise undertaken by the employer.

Rodgers v. Kemper Constr. Co., 50 Cal. App. 3d 608, 619 (1975).

3. *Misconduct Prohibited by Employer.* An employee who violates an employer's rules might still be treated as having acted within the scope of employment. If all employee violations of workplace rules were treated as acts outside the scope of employment, employers could avoid the impact of the *respondeat superior* doctrine by adopting rules that prohibited all risky conduct or potentially harmful conduct.

4. *Intentional Torts.* Courts use a variety of approaches for determining when an employee's intentional tort may be treated as the responsibility of the employer. California, for example, has held that a sexual tort will not be treated as within the scope of employment unless its motivating emotions were attributable to work-related events or conditions. See Lisa M. v. Henry Mayo Newhall Memorial Hospital, 907 P.2d 358 (Cal. 1995). In some cases, courts have held that the circumstances of employment create a special risk of intentional tort and for that reason will impose *respondeat superior* liability. See, e.g., Costos v. Coconut Island Corp., 137 F.3d 46 (1st Cir. 1998), where the manager of an inn raped a guest. See also Fearing v. Bucher, 977 P.2d 1163 (Or. 1999), in which a young person who allegedly was the victim of sexual abuse by a member of the clergy was permitted to seek damages against the church. The court stated that "a jury reasonably could infer that . . . performance of his pastoral duties with respect to plaintiff and his family were a necessary precursor to the sexual abuse and that the assaults thus were a direct outgrowth of and were engendered by conduct that was within the scope of . . . employment."

Perspective: Relating "Deep Pocket" to Enterprise and Risk Avoidance Theories

A court or a jurisdiction may choose a test that reflects its theory for why vicarious liability is imposed. The foreseeability approach, for instance, focuses on making a business pay its own way by internalizing the risks it creates and is consistent with the *enterprise risk theory.* Some elements of the Restatement (Second) of Agency test and the *McDonald's* test are relevant to whether the employer could have taken precautions to minimize the risks created, reflecting the *risk avoidance theory.* Do any of the factors seem to relate directly to the most frequently stated justification, the desire to ensure that victims are compensated by a defendant who is likely to have assets or insurance?

SANTIAGO v. PHOENIX NEWSPAPERS, INC.

794 P.2d 138 (Ariz. 1990)

GRANT, C.J.

. . . On April 20, 1986, a car driven by Frank Frausto (Frausto) collided with a motorcycle driven by Santiago. At the time Frausto was delivering the Sunday edition

of the Arizona Republic on his route for PNI. Santiago filed a negligence action against Frausto and PNI, alleging that Frausto was PNI's agent. Both parties moved for summary judgment. The court, finding no genuine issues of material fact, concluded that Frausto was an independent contractor. The court of appeals agreed, stating that "[p]arties have a perfect right, in their dealings with each other, to establish the independent contractor status in order to avoid the relationship of employer-employee, and it is clear from the undisputed facts that there was no employer-employee relationship created between PNI and Frausto." Santiago seeks review of this ruling.

We view the facts most favorably to Santiago, as the party opposing the summary judgment.

Frausto began delivering papers for PNI in August 1984 under a "Delivery Agent Agreement," prepared by PNI. The agreement provided that Frausto was an "independent contractor," retained to provide prompt delivery of its newspapers by the times specified in the contract. . . .

In ruling on the summary judgment motion, the court considered the affidavits of Frausto and David L. Miller, a delivery agent and former employee driver. Frausto stated in his affidavit that, despite the contractual nomenclature, he considered himself an employee and delivered the papers any way his supervisor directed him to. This included placing the paper in a particular spot if requested by a customer. If he did not comply with these requests, his supervisor would speak to him and he could be fired. Miller stated in his affidavit that he had been a service driver, later switched to being a delivery agent, and that, in his view, there was no significant difference between the level of supervision provided to those holding the two positions. . . .

Section 220 of the Restatement (Second) of Agency, adopted by Arizona, defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." The Restatement lists several additional factors, none of which is dispositive, in determining whether one acting for another is a servant or an independent contractor. We now review those factors, along with the cases considering them, for evidence of an employer-employee relationship which could preclude the entry of summary judgment.

As a prefatory note, we reject PNI's argument that the language of the employment contract is determinative. Contract language does not determine the relationship of the parties, rather the "objective nature of the relationship, [is] determined upon an analysis of the totality of the facts and circumstances of each case." Anton v. Industrial Commission, 688 P.2d 192, 194 (App. 1984). . . .

In determining whether an employer-employee relationship exists, the fact finder must evaluate a number of criteria. They include: 1. The extent of control exercised by the master over details of the work and the degree of supervision; 2. The distinct nature of the worker's business; 3. Specialization or skilled occupation; 4. Materials and place of work; 5. Duration of employment; 6. Method of payment; 7. Relationship of work done to the regular business of the employer; 8. Belief of the parties.

1. *The extent of control exercised by the master over the details of the work.* Such control may be manifested in a variety of ways. A worker who must comply with another's instructions about when, where, and how to work is an employee. . . .

. . . For example, an appellate court overturned the trial court's finding of no employer-employee relationship in Gallaher v. Ricketts, 187 So. 351, 355 (La. Ct. App. 1939). The newspaper carrier in *Gallaher* provided his own transportation and was paid a commission for every dollar worth of papers delivered on his assigned route. The company conducted training programs, including tips on how to distribute the paper and stimulate sales, reimbursed him for some transportation expenses, and retained the right to terminate him at any time. The court concluded that these indices of control demonstrated that the carrier "was merely a cog in the wheel of the defendant's enterprise," and held that Ricketts was an employee. . . .

In this case, PNI designated the time for pick-up and delivery, the area covered, the manner in which the papers were delivered, i.e., bagged and banded, and the persons to whom delivery was made. Although PNI did little actual supervising, it had the authority under the contract to send a supervisor with Frausto on his route. Frausto claimed he did the job as he was told, without renegotiating the contract terms, adding customers and following specific customer requests relayed by PNI.

2. *The distinct nature of the worker's business.* Whether the worker's tasks are efforts to promote his own independent enterprise or to further his employer's business will aid the fact finder in ascertaining the existence of an employer-employee relationship. Tanner v. USA Today, 179 Ga. App. 722, 347 S.E.2d 690 (1986). The agent in *Tanner* contracted with USA Today to distribute papers. The agent in turn hired carriers to deliver the papers using his trucks. USA Today had no control over the choice of drivers, the trucks used, or the route taken. Under these circumstances, and despite USA Today's imposition of time parameters for delivery, the court found insufficient evidence to raise the issue of an employer-employee relationship. . . .

As far as the nature of the worker's business, Frausto had no delivery business distinct from that of his responsibilities to PNI. Unlike the drivers in *Tanner*, Frausto had an individual relationship and contract with the newspaper company. Furthermore, he did not purchase the papers and then sell them at a profit or loss. Payments were made directly to PNI and any complaints or requests for delivery changes went through PNI. If Frausto missed a customer, a PNI employee would deliver a paper.

3. *Specialization or skilled occupation.* The jury is more likely to find a master-servant relationship where the work does not require the services of one highly educated or skilled. PNI argues that its agents must drive, follow directions, and be diligent in order to perform the job for which they are paid. However, these skills are required in differing degrees for virtually any job. Frausto's services were not specialized and required no particular training. In addition, an agreement that work cannot be delegated indicates a master-servant relationship. In this case, Frausto could delegate work but only up to twenty-five percent of the days.

4. *Materials and place of work.* If an employer supplies tools, and employment is over a specific area or over a fixed route, a master-servant relationship is indicated. In this case, PNI supplied the product but did not supply the bags, rubber bands, or transportation necessary to complete the deliveries satisfactorily. However, PNI did designate the route to be covered.

5. *Duration of employment.* Whether the employer seeks a worker's services as a one-time, discrete job or as part of a continuous working relationship may indicate that the employer-employee relationship exists. The shorter in time the relationship,

the less likely the worker will subject himself to control over job details. In addition, the employer's right to terminate may indicate control and therefore an employer-employee relationship. The "right to fire" is considered one of the most effective methods of control. In this case, the contract provided for a six-month term, renewable as long as the carrier performed satisfactorily. Frausto could be terminated without cause in 28 days and with cause immediately. The definition of cause in the contract was defined only as a failure to provide "satisfactory" service. A jury could reasonably infer that an employer-employee relationship existed since PNI retained significant latitude to fire Frausto inasmuch as the "satisfactory service" provision provides no effective standards. In addition, the jury could also infer that PNI provided health insurance to encourage a long-term relationship and disability insurance to protect itself in case of injury to the carrier, both of which support the existence of an employer-employee relationship.

6. *Method of payment.* PNI paid Frausto each week, but argues that because Frausto was not paid by the hour, he was an independent contractor. Santiago responds that payment was not made by the "job" because Frausto's responsibilities changed without any adjustment to his pay or contract.

7. *Relation of work done to the employer's regular business.* A court is more likely to find a worker an employee if the work is part of the employer's regular business. . . .

Home delivery is critical to the survival of a local daily paper; it may be its essential core. As one court explained:

> The delivery of newspapers within a reasonable time after publication is essential to the success of the newspaper business. For the greater portion of its income the paper depends on advertising, and the rates for advertising are governed by the paper's circulation. Circulation is a necessity for success. The delivery boys are just as much an integral part of the newspaper industry as are the typesetters and pressmen or the editorial staff.

Cooper v. Asheville Citizen-Times Publishing Co., 129 S.E.2d 107, 114 (1963). PNI is hard-pressed to detach the business of delivering news from that of reporting and printing it, especially when it retains an individual relationship with each carrier.

8. *Belief of the parties.* As stated above, Frausto believed that he was an employee, despite contract language to the contrary. Even if he believed he was an independent contractor, that would not preclude a finding of vicarious liability. As the Restatement explains: "It is not determinative that the parties believe or disbelieve that the relation of master and servant exists, except insofar as such belief indicates an assumption of control by the one and submission of control by the other." Restatement §220 comment m. In addition to the parties' belief, the finder of fact should look to the community's belief. "Community custom in thinking that a kind of service is rendered by servants . . . is of importance." Restatement §220 comment h. The fact that the community regards those doing such work as servants indicates the relation of master and servant. The newspaper's customers did not have individual contact or contracts with Frausto. All payments, complaints, and changes were made directly to PNI. From these facts, a jury could infer that the community regarded Frausto as PNI's employee.

Again, analyzing these factors in relation to the facts of this case a jury could determine that an employer-employee relationship existed between PNI and Frausto.

Whether an employer-employee relationship exists may not be determined as a matter of law in either side's favor, because reasonable minds may disagree on the

nature of the employment relationship. A jury could infer from these facts that Frausto was an employee because PNI involved itself with the details of delivery, received directly all customer complaints and changes so as to remove much of Frausto's independence, retained broad discretion to terminate, and relied heavily on Frausto's services for the survival of its business. The jury could also infer that Frausto was an independent contractor because he used his own car, was subject to little supervision, provided some of his own supplies, and could have someone else deliver for him within limits. Therefore, the trial court erred in finding as a matter of law that Frausto was an independent contractor. Summary judgment on the vicarious liability claim was inappropriate. The opinion of the court of appeals is vacated and the case is remanded to the superior court for proceedings consistent with this opinion.

NOTES TO SANTIAGO v. PHOENIX NEWSPAPERS, INC.

1. ***Multifactor Test for Independent Contractor.*** The court's examination of the multiple factors for determining independent contractor status does not explain how much weight each factor should receive. Nor does the court say what each factor indicates in this particular case. Apparently a jury would be entitled to find either that Frausto was or was not an employee of PNI. The court does say how, in general, each factor is relevant to the issue of whether the worker is an employee or an independent contractor. Reviewing the court's discussion of each factor, to what conclusion does the evidence in *Santiago* point?

2. ***Inherently Dangerous Activities.*** An exception to the rule precluding vicarious liability for the acts of independent contractors applies to situations where an employer hires an independent contractor to perform an inherently dangerous task. The exception applies to work that is dangerous even when done with reasonable care, such as demolition and excavation. It applies to dangers that are naturally understood to be present in the endeavor. Construction work, for instance, may not be inherently dangerous because building a deck on the back of a house is not dangerous if done carefully. Construction work may be inherently dangerous, however, if it involves blowing up an office building in order to clear the work site. Such tasks are said to give rise to "nondelegable duties" to use reasonable care to protect third parties against injuries from those activities. Courts have denied employers the insulation of the independent contractor exception to *respondeat superior* in connection with the following activities: transporting large logs on highways (Risley v. Lenwell, 27 P.2d 897 (1954)); marking lines on the pavement of a busy street (Van Arsdale v. Hollinger, 437 P.2d 508 (Cal. 1968)); crop-dusting (Boroughs v. Joiner, 337 So. 2d 340 (Ala. 1976)); using a scaffold to carry out work on a high floor of a building located on a busy street (Lockowitz v. Melnyk, 148 N.Y.S.2d 232 (1956)).

B. Vicarious Liability for Vehicle Owners

To increase the likelihood that people injured by the use and operation of automobiles will recover damages, state statutes make vehicle owners vicariously liable for the tortious conduct of all users of their vehicles. Levitt v. Peluso illustrates that this rule applies even when vehicle's owner is not driving it and the tortfeasor is a passenger

rather than a driver. The case also discusses the limits on this source of vicarious liability.

LEVITT v. PELUSO

638 N.Y.S.2d 878 (N.Y. Sup. Ct. 1995)

McCaffrey, J.

This is a negligence action arising out of a May 20, 1994 accident wherein the plaintiff, a pedestrian, was blinded in one eye by an egg thrown from a moving automobile owned by defendant Eugene Peluso and permissively operated by defendant Patrick Peluso in which defendant Russell DiBenedetto was a passenger. The sole basis of liability alleged against defendant Eugene Peluso is Vehicle and Traffic Law (VTL) §388 which imposes vicarious liability against the owner of a motor vehicle for injury resulting from negligence in its permissive use or operation. . . .

Under certain circumstances, Vehicle and Traffic Law §388 imposes civil liability on the absent owner of a negligently used or operated vehicle when such use or operation results in death or injury. Specifically the statute provides, in part:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. . . .

VTL §388 imposes liability upon an absent owner when four prerequisites are met: 1) death or injury to person or property, 2) the harm is the result of the operator's negligence, 3) the negligence arose from the use or operation of the vehicle, and 4) the operator was using the vehicle with the owner's permission.

The imposition of civil liability upon an absent owner is an expression of policy that one injured by the negligent use or operation of a motor vehicle should have recourse to a financially responsible defendant, i.e., the owner.

Plaintiff alleges he was injured by the permissive but negligent "use and operation" of an automobile owned by Eugene Peluso. Thus, plaintiff contends, pursuant to VTL §388, defendant Eugene Peluso is civilly liable for his injuries. . . .

Plaintiff's contention is that employment of the car as a means of transportation to and from the situs of the injury and as the place from which the eggs were thrown (i.e., "use" of the vehicle), plus the effect of the car's speed and forward momentum (i.e., "operation" of the vehicle) on the velocity of the thrown egg, makes such use and operation a substantial factor in the production of the injury. . . .

Among the jurisdictions which have determined that an accident or injury caused by objects thrown from a moving vehicle arose out of the "use or operation" of a vehicle are: a) a remarkably similar case from California involving the use of an automobile by four teenage boys and the throwing of an egg from a moving car which resulted in a severe eye injury to a pedestrian (National Am. Ins. Co. v. Insurance Co. of N. America, 74 Cal. App. 3d 565, 140 Cal. Rptr. 828 [1977]; b) a Florida incident (Valdes v. Smalley, 303 So. 2d 342 [Fla. App. 3d Dist. 1974], *cert. den.*, 341 So. 2d 975 [Fla. 1977]) involving the death of a pedestrian from a beer mug thrown from a moving vehicle; and c) a New Jersey case involving a bicyclist who was struck by a stick with a

nail in it tossed from a moving vehicle (Westchester Fire Ins. Co. v. Continental Ins. Co., 126 N.J. Super. 29, 312 A.2d 664, *affd.*, 65 N.J. 152, 319 A.2d 732). Those decisions all . . . appear to be premised upon the general principle that insurance policies should be construed liberally in favor of the insured in order to afford purchasers a broad measure of protection. For example, the New Jersey Appellate Division in *Westchester Fire Ins. Co.*, supra, stated in part:

> We agree with the automobile carriers' contention that the phrase "arising out of the . . . use" is not synonymous with "while riding." As one court commented, such a construction would write from the contract the words "arising out of." See Speziale v. Kohnke, 194 So. 2d 485 (La. App. 1967).
>
> But we do not agree that the words "arising out of the . . . use" require or justify the interpretation that before coverage exists it must appear that the injury is a direct and proximate result, in a strict legal sense, of the use of the automobile.
>
> We consider that the phrase "arising out of" must be interpreted in a broad and comprehensive sense to mean "originating from" or "growing out of" the use of the automobile. So interpreted, there need be shown only a substantial nexus between the injury and the use of the vehicle in order for the obligation to provide coverage to arise. The inquiry should be whether the negligent act which caused the injury, although not foreseen or expected, was in the contemplation of the parties to the insurance contract a natural and reasonable incident or consequence of the use of the automobile, and thus a risk against which they might reasonably expect those insured under the policy would be protected. (126 N.J. Super., at 37-38, 312 A.2d, at 668-669, *supra.*)

Under similar fact patterns, numerous other foreign courts have found an insufficient causal relationship between the use or operation of the vehicle and the incident. In Government Employees Ins. Co. v. Melton, 357 F. Supp. 416 (D.C.S.C. 1972), *aff'd*, 473 F.2d 909 (4th Cir. 1973), applying South Carolina law,

> The court noted that the complaint alleged that one or more of the occupants in the rear of a pickup truck threw a bottle or bottles out of the rear of the truck and struck the injured parties. The court stated that a causal relation or connection has to exist between an accident or the injury and the use of the vehicle in order for the accident or injury to come within the meaning of the phrase "arising out of the use" of a vehicle. The court pointed out that the vehicle in question was not used for the purpose for which it was designed, for there could be no realistic conclusion that it was designed for the purpose of allowing, permitting, or encouraging bottles or other injurious matter to be thrown therefrom. The court thus concluded that the causal relationship between the use of the vehicle and the incident in question simply did not exist. (Schaefer, *Automobile Liability Insurance: What Are Accidents or Injuries Arising Out of Ownership, Maintenance, or Use of Insured Vehicle,* 15 ALR 4th 10, §9[b].)

A variety of additional determinations from other jurisdictions holding that no causal relationship was present in the throwing of objects from a moving vehicle exist.

A review of the aforementioned determinations from other jurisdictions reveals that the prevailing opinion of our sister states concerning *insurance coverage* for injuries from objects thrown from a moving vehicle in that an element of causality, though not necessarily the proximate cause, is required.

Such as in *Westchester Fire Ins. Co.*, supra, the New Jersey Appellate Division opined that:

> In our mobile society the act of throwing or dropping objects from moving vehicles is not such an uncommon phenomenon that such occurrence may not be anticipated, nor so inconsequential that members of the public need no financial protection from the consequences thereof. (126 N.J. Super., at 38-39, 312 A.2d, at 669, supra.)

However, any such broadening of statutorily imposed vicarious *liability* in New York should be accomplished legislatively and not by judicial fiat.

In *Manhattan and Bronx Surface Transit Operating Authority (Gholson)*, 71 A.D.2d 1004, 1005, 420 N.Y.S.2d 298, 299 (2d Dept. 1979) the Appellate Division, Second Department enunciated a definition of "use or operation" for purposes of determining an insurer's liability under standard automobile liability policies which is instructive for purposes of determining defendant Eugene Peluso's potential vicarious liability pursuant to VTL §388.

In *Gholson*, a bus driver was stabbed after refusing to allow a passenger to disembark at an unmarked stop. The court held that the bus driver was not injured as a result of the use or operation of a motor vehicle. More specifically, the court set forth the following test which must be met before finding "use and operation": (1) The accident must have arisen out of the inherent nature of the automobile, as such; (2) The accident must have arisen within the natural territorial limits of an automobile and the actual use, loading or unloading must not have terminated; and (3) The automobile must not have merely contributed to the cause and the condition but itself must produce or be a proximate cause of the injury.

The second element of the *Gholson* test, which deals with territorial limits, seems to be satisfied by the facts of this case. The first and third elements, however, are not met. First of all, the inherent nature of an automobile is to serve as a means of transportation to and from a certain location, and not to serve as a "launching pad" to project foreign matter such as eggs. The term "inherent," as defined by the Living Webster's Dictionary of the English Language means "innate, existing inseparably within an object." To say that the inherent nature of an automobile is to serve as a "launching pad" for eggs mischaracterizes the innate nature of a car. The injury here did not arise from the inherent nature of a car; rather, the injury arose incident to an intentional act, i.e., the throwing of an egg.

With respect to element number three in the *Gholson* test dealing with causation, the car itself did not produce the injury in question. Rather, the injury resulted from the occupant or driver intentionally throwing an egg out of the automobile. That is, the driving of the automobile was merely incidental. The car indirectly contributed to the injury which was brought about by the intentional assault of throwing the egg. *Gholson* states mere contribution to the incident does not constitute "use or operation."

Furthermore, "where the operation of driving function of an automobile or the condition of the vehicle itself is not the proximate cause of the injury, the occurrence does not arise out of its use or operation." United Servs. Automobile Assn. v. Aetna Cas. & Sur. Co., 75 A.D.2d 1022, 429 N.Y.S.2d 508 (4th Dept.1980). In that case, the injured party was a passenger in a vehicle hit in the eye by a wadded tinfoil gum wrapper thrown by another passenger while the vehicle was moving. The court held that "use or operation" of vehicle was not shown to be a proximate cause of the injury. In Olin v. Moore, 178 A.D.2d 517, 577 N.Y.S.2d 446 (2d Dept.1991), it was held that

where a passenger in a moving bus was bitten by a fellow passenger the injury did not arise from the use or operation of the vehicle. . . .

Therefore, in order to impose vicarious liability under Vehicle and Traffic Law §388 the "operation of driving function of an automobile or the condition of the vehicle itself" must be the proximate cause of injury (*United Services Automobile Association*, supra at 510). While the use of Mr. Peluso's vehicle may have contributed to the severity of plaintiff's injury and the infant defendants' temporary escape, the proximate cause of plaintiff's injury was the independent act of throwing the egg. Plaintiff's injury did not therefore arise out of the "use or operation" of the vehicle pursuant to §388 and defendant Eugene Peluso, individually, is not vicariously liable for co-defendants' acts. . . .

NOTES TO LEVITT v. PELUSO

1. ***Use and Operation of a Motor Vehicle.*** Imposing vicarious liability on a vehicle's owner requires more than the mere presence of an auto at the scene of an injury and more than the fact that the tortfeasor was *in* the auto. How much more is required? The court in *Levitt* used the "use and operation" language from the statute to create limits on the owner's vicarious liability. Why was the egg-throwing not a "use" of the motor vehicle?

2. ***Rationale for Vicarious Liability.*** The *Levitt* court cites the desire to compensate victims as the justification for imposing vicarious liability on automobile owners, who are likely to have accident insurance. If compensation is the goal, why would the law limit vicarious liability to only some victims of negligence associated with the car? Limits on the scope of coverage of automobile insurance suggested to this court that similar limits on vicarious liability might be appropriate.

Perspective: Use and Operation of a Motor Vehicle

In *Levitt*, the court's analysis of whether the accident resulted from "use or operation" of the vehicle reflected three different perspectives. The first is whether the vehicle was involved in an important enough way to justify vicarious liability. From this perspective the court was concerned about whether there was a "substantial nexus" between the injury and the use of the vehicle and whether use and operation of the vehicle was "a substantial factor in producing the injury." A second perspective focuses on whether the accident is an expected consequence of the use of the vehicle. The accident is less foreseeably related to use if it is a consequence that was not "in the contemplation of the parties" to an insurance contract protecting the owner. The third perspective is whether the accident is "a natural and reasonable incident or consequence of the use of the automobile." These perspectives overlap with one another and are reminiscent of the three major approaches to the analysis of proximate cause: the substantial factor, foreseeability, and directness tests.

CHAPTER 9

PROFESSIONALS

I. Introduction

Tort cases involving *professionals*, like other cases, require proof of duty, breach, causation, and damages. A number of doctrines have developed to clarify the role of those elements for professional malpractice cases. This chapter examines issues in defining the standard of care for professionals, in selecting a local or national context for evaluating their conduct, and in determining when these cases should require the use of expert testimony.

II. Professional Standard's Basic Definition and Rationale

Courts differ on whether the standard of care for professionals requires a jury to compare a professional's conduct to his or her profession's position on proper conduct or to the jury's own conclusion about what conduct is reasonable. Osborn v. Irwin Memorial Blood Bank presents a typical description of the professional standard and highlights the differences between determinations of the negligence of a professional and a nonprofessional. Nowatske v. Osterloh articulates an alternative standard that incorporates the reasonable person standard. Another facet of the professional standard involves identifying the activities to which it should apply. Rossell v. Volkswagen of America considers whether that standard should govern an activity that is complex and technologically advanced but that might not fit a traditional definition of "professional."

OSBORN v. IRWIN MEMORIAL BLOOD BANK

7 Cal. Rptr. 2d 101 (Ct. App. Cal. 1992)

PERLEY, A.J. . . .

In February of 1983, at the age of three weeks, Michael Osborn contracted the AIDS virus from a blood transfusion in the course of surgery on his heart at the

University of California at San Francisco Medical Center. The blood used in the operation was supplied by the Irwin Memorial Blood Bank. Michael and his parents, Paul and Mary Osborn, sued Irwin and the University for damages on various theories. . . .

The most significant issue on appeal is whether Irwin was entitled to judgment notwithstanding the verdict on the issue of negligence. Qualified experts opined for plaintiffs that Irwin's blood testing and donor screening practices prior to Michael's surgery were negligent in light of concerns about AIDS at the time [because they did not include anti-HBc tests]. On matters such as these that are outside common knowledge, expert opinion is ordinarily sufficient to create a prima facie case. Here, however, there was uncontradicted evidence that Irwin was doing as much if not more in the areas of testing and screening than any other blood bank in the country, and there is no question that it followed accepted practices within the profession. We hold that Irwin cannot be found negligent in these circumstances. . . .

The form of [the plaintiffs'] experts' testimony suggests that plaintiffs assumed their case against Irwin was one of ordinary negligence. Plaintiffs' experts did not couch their opinions in terms of the standard of care for blood banks in early 1983. They simply said what Irwin "should" have done, or what a "reasonable person" would have done, in light of what was known about AIDS at the time. We ultimately conclude that this distinction is one of substance as well as form, but the threshold question is whether Irwin should be held to a professional standard of care.

We note that this appears to be a point of first impression in California. The precedents indicating that blood banks are not subject to strict liability for providing contaminated blood have observed that blood banks may be sued for negligence but have not undertaken to define the standard of care. We have determined that Irwin is a "health care provider" within the meaning of MICRA [the Medical Injury Compensation Reform Act], and there is no question that donor screening and blood testing are "professional services" for purposes of MICRA (see Civ. Code, §3333.1, subd. (c)(2), 3333.2, subd. (c)(2); and Code Civ. Proc., §667.7, subd. (e)(4) [defining "professional negligence" in pertinent part as "a negligent act or omission to act by a health care provider in the rendering of professional services"].) However, MICRA's damage limitations do not purport to define the standard of care.

We conclude that the adequacy of a blood bank's actions to prevent the contamination of blood is a question of professional negligence and fulfillment of a professional standard of care. . . .

Plaintiffs contend that custom and practice are relevant, but not conclusive, on the standard of care. This is the general rule in cases of ordinary negligence. (See Keeton, *Medical Negligence—The Standard of Care* (1979) 10 Tex. Tech L. Rev. 351, 354 [hereafter Keeton].) The leading case for this rule is *The T.J. Hooper* (2d Cir. 1932) 60 F.2d 737, 740, where Learned Hand wrote that "in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." There is no question that California follows this rule in ordinary negligence cases.

This is a case of professional negligence, however, and we must assess the role of custom and practice in that context. The question presented here is whether California

law permits an expert to second-guess an entire profession. We have found no definitive precedent on this issue and it is not one that is likely to arise.

Custom and practice are not controlling in cases, unlike ours, where a layperson can infer negligence by a professional without any expert testimony. . . .

On the other hand, in cases like ours where experts are needed to show negligence, their testimony sets the standard of care and is said to be "conclusive". . . .

Here it is undisputed that no blood bank in the country was doing what the plaintiffs' experts' standard of care would require of Irwin, and we have an unusual situation where we are called upon to address the significance of a universal practice.

This issue was certified to the South Carolina Supreme Court in Doe v. American Red Cross Blood Services, S.C. Region, supra, 125 F.R.D. 637, in the context of a claim that the Red Cross was negligent for failing to perform anti-HBc surrogate tests for AIDS before January of 1985. The federal court asked whether "professionals are always absolved from negligence liability where their conduct is consistent with generally recognized and accepted professional practices," and stated that "courts and commentators across the country are sharply split on this question."

While it may be true that "[a]n increasing number of courts are rejecting the customary practice standard in favor of a reasonable care or reasonably prudent doctor standard" (Prosser & Keeton, *The Law of Torts* (5th ed., 1988 pocket supp.) p.30, fn. 53 [citing cases outside California]), numerous commentaries have noted that custom generally sets the standard of care. (See, e.g., King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula* (1975) 28 Vand. L. Rev. 1213, 1235, 1245-1246 [hereafter King].)

Most commentators have urged that a customary or accepted practice standard is preferable to one that allows for the disregard of professional judgment. . . .

The basic reason why professionals are usually held only to a standard of custom and practice is that their informed approach to matters outside common knowledge should not be "evaluated by the ad hoc judgments of a lay judge or lay jurors aided by hindsight." (King, supra, 28 Vand. L. Rev. at p.1249.) In the words of a leading authority, "When it can be said that the collective wisdom of the profession is that a particular course of action is the desirable course, then it would seem that the collective wisdom should be followed by the courts." (Keeton, supra, 10 Tex. Tech. L. Rev. at pp.364-365.) . . .

[I]n Landeros v. Flood, 17 Cal. 3d 399 [1976], the [California Supreme Court] considered whether a cause of action for malpractice could be stated for failure to diagnose the battered child syndrome. The trial court had sustained the defendants' demurrers and dismissed the case. The Supreme Court reversed, observing that battered child syndrome had been widely reported in the medical literature prior to the plaintiff's treatment, and thus it could not be said as a matter of law that the defendants were not negligent in failing to recognize the syndrome. Justice Mosk's opinion for a unanimous court, however, also noted that proof of the standard of care would require expert testimony on whether the procedures recommended in the literature had actually become the norm within the profession: "The question is whether a reasonably prudent physician examining this plaintiff in 1971 would have been led to suspect she was a victim of the battered child syndrome from the particular injuries and circumstances presented to him, would have confirmed that diagnosis by ordering X-rays of her entire skeleton, and would have promptly reported his findings to appropriate authorities to prevent a recurrence of the injuries. There are numerous

recommendations to follow each of these diagnostic and treatment procedures in the medical literature cited above.

"Despite these published admonitions to the profession, however, neither this nor any other court possesses the specialized knowledge necessary to resolve the issue as a matter of law. We simply do not know whether the views espoused in the literature *had been generally adopted in the medical profession by the year 1971, and whether the ordinarily prudent physician was conducting his practice in accordance therewith.* The question remains one of fact, to be decided on the basis of expert testimony. . . ." (Landeros v. Flood, supra, 17 Cal. 3d at pp.409-410 [footnote omitted, italics added].) . . .

The [*Landeros*] court does not refer to custom, and its discussion suggests that the lack of an established custom for diagnosing and treating battered child syndrome would not preclude a finding of negligence if it could be said that professional admonitions on the subject had been "generally adopted." The court may thus have moved beyond a customary practice standard to one of "accepted" practice, based on "reasonable expectations that the profession collectively holds for its members" rather than "tradition and habit." (King, supra, 28 Vand. L. Rev. at p.1241; see also at p.1243 [proof of accepted practice may be based inter alia on "the best of available medical literature"].)

Like . . . earlier cases, however, Landeros v. Flood confirms that professional prudence is defined by actual or accepted practice within a profession, rather than theories about what "should" have been done. The issue was not the existence of recommendations with respect to battered child syndrome, but whether physicians were "conducting [their] practice in accordance therewith." This is implicit in the definition of the standard of care as skill and knowledge "ordinarily possessed *and exercised*" in a profession. (Landeros v. Flood, supra, 17 Cal. 3d at pp.408, 410 [italics supplied].)

It follows that Irwin cannot be found negligent for failing to perform tests that no other blood bank in the nation was using. Judgment notwithstanding the verdict was properly granted to Irwin on the issue of anti-HBc testing because there was no substantial evidence that failure to conduct the tests was not accepted *practice* for blood banks in January and February of 1983. . . .

NOTES TO OSBORN v. IRWIN MEMORIAL BLOOD BANK

1. *Rationale for the Directed Verdict.* A defendant is entitled to judgment as a matter of law if the plaintiff's evidence, construed most favorably to the plaintiff, cannot rationally support a verdict for the plaintiff under applicable legal doctrines. In *Osborn*, what shortcoming in the plaintiff's evidence required a verdict in favor of the defendant? Would the defendant have been entitled to a directed verdict if the professional standard had not been applied?

2. *Majority View.* The court in *Osborn* states that "professional prudence is defined by actual or accepted practice with a profession, rather than theories about what 'should' have been done." The Restatement (Second) of Torts states that a physician must "exercise the skill and knowledge normally possessed" by other physicians (§299A). The *Osborn* court observes that implicit in the "skill and knowledge" language is reference to the skill and knowledge "ordinarily possessed *and exercised*" by the profession. A number of writers have contended that the traditional approach to professional malpractice allows the profession to establish its own standard.

See, e.g., Clarence Morris & C. Robert Morris, Jr., *Morris on Torts* 55 (2d ed. 1980) (custom controls medical malpractice cases); Prosser & Keeton, *The Law of Torts* 189 (5th ed. 1984) ("the standard becomes one of 'good medical practice,' which is to say, what is customary and usual in the profession").

3. *Power of the Professional Standard.* The *Osborn* court discusses a California Supreme Court decision, Landeros v. Flood, which distinguished between the actual conduct of physicians and published admonitions about how physicians should act in certain circumstances. Under the standards adopted in *Osborn* and *Landeros*, may a plaintiff win a medical malpractice case by showing that a physician acted in accordance with customary practices but that those practices were being criticized at the time by some members of the profession?

4. *Problem: Evidence of Standard.* In a state where a malpractice plaintiff is required to introduce evidence of the professional standard of care, would the following expert testimony be adequate to resist a defendant's motion for judgment as a matter of law or a directed verdict?

> Q. Are you familiar with the appropriate standard of care and skill that reasonably competent physicians and surgeons in the national medical community would ordinarily exercise when acting under the same or similar circumstances for the treatment and care given to the plaintiff by the defendant doctor?
>
> A. My main objection was the breakdown or the absence of or the deterrence of any communication between the various caretakers.
>
> Q. Doctor, then, is it your opinion that the defendant doctor deviated from the national medical community standards in the care and treatment of the plaintiff in that regard in this case?
>
> A. Well, I don't want to point fingers. But I do think that there was some reduced care below the standards.

See Pruitt v. Zeiger, 590 So. 2d 236 (Ala. 1991).

Perspective: Class Allegiance

In his famous treatise, William L. Prosser suggested that the legal system developed the professional standard of care because of "the healthy respect which the courts have had for the learning of a fellow profession, and their reluctance to overburden it with liability." Prosser and Keeton, *The Law of Torts* 189 (5th ed. 1984). Most physicians nowadays would not agree that the law has worked to protect them from liability, but assuming Prosser's historical intuition is correct, does it reveal a class bias in appellate courts?

NOWATSKE v. OSTERLOH

198 Wis. 2d 419, 543 N.W.2d 265 (1996)

ABRAHAMSON, J.

This is an appeal by Kim and Julie Nowatske from a judgment of the circuit court for Winnebago County, Thomas S. Williams, judge. The circuit court dismissed the

complaint upon a jury finding that Mark D. Osterloh, M.D. (the defendant), did not negligently cause the Nowatskes' injuries. Upon certification of the court of appeals pursuant to Wis. Stat. (Rule) §809.61 (1993-94), this court accepted the case but limited its review to the following issue: "Whether standard jury instruction Wis JI-Civil 1023 accurately states the law of negligence for medical malpractice cases?" We conclude that the jury instruction read as a whole was not erroneous. . . .

We briefly summarize the facts giving rise to this case, recognizing that the parties dispute whether certain events occurred, whether the surgery and care provided by the defendant were negligent and whether the defendant's alleged negligence caused the plaintiff's injury.[2]

One morning the plaintiff noticed an area of blurred vision in his right eye. He was referred to the defendant, a retina specialist in Oshkosh, who diagnosed him as having a retinal detachment.

Prior to surgery to repair his retina, the plaintiff signed a consent form explaining the risks and possible complications involved in the proposed treatment. . . .

On the morning following surgery, the defendant conducted a post-operative visit to assess the success of his surgery. The parties dispute whether the defendant measured the IOP [internal pressure in the eye]. The defendant tested the plaintiff's vision with an ophthalmoscope, shining a light into the eye to check its response. . . .

By the next morning, the swelling around the plaintiff's eye had subsided. Because the defendant had not indicated when the plaintiff's vision would return, the plaintiff remained unconcerned about his continuing inability to see out of his right eye. At the plaintiff's scheduled follow-up appointment, however, the defendant informed the plaintiff that he would be permanently blind in the right eye. The parties dispute whether the blindness was caused by increased anterior IOP resulting from the surgery or by a discrete vascular event such as an occlusion of the central retinal artery posteriorly.

On April 22, 1991, the plaintiff filed a complaint alleging that the defendant negligently treated him. During a five-day jury trial in January 1993, the plaintiff introduced expert testimony suggesting that if the defendant had utilized reasonable care, the plaintiff would not have lost his eyesight. The defendant, in turn, introduced expert testimony suggesting that the defendant had exercised ordinary care and that a high IOP was not the cause of the plaintiff's blindness.

At the defendant's request and over the plaintiff's objection, the circuit court used various paragraphs from the standard jury instruction pertaining to medical malpractice, Wis JI-Civil 1023, to instruct the jury. In response to the verdict question asking whether the defendant was negligent, the jury answered "no," thus returning a verdict in his favor. The circuit court entered a judgment dismissing the complaint. . . .

The plaintiff's claim that Wis JI-Civil 1023 is erroneous and prejudicial focuses on the first three paragraphs of the instruction. As presented to the jury in this case, those paragraphs, virtually unmodified from the pattern instruction, read as follows:

> In treating Kim Nowatske, Dr. Osterloh was required to use the degree of care, skill, and judgment which is usually exercised in the same or similar circumstances by the average specialist who practices the specialty which Dr. Osterloh practices, having due regard for the state of medical science at the time Kim Nowatske was treated. The

[2] Both Kim Nowatske and his wife Julie Nowatske are plaintiffs in this case. In the interest of clarity, we refer only to Kim Nowatske as the plaintiff.

> burden in this case is on the plaintiffs to prove that Dr. Osterloh failed to conform to this standard.
>
> A physician does not guarantee the results of his care and treatment. A physician must use reasonable care and is not liable for failing to use the highest degree of care, skill, and judgment. Dr. Osterloh cannot be found negligent simply because there was a bad result. Medicine is not an exact science. Therefore, the issue you must decide in determining whether Dr. Osterloh was negligent is not whether there was a bad result but whether he failed to use the degree of care, skill, and judgment which is exercised by the average physician practicing the sub-specialty of retinal surgery.
>
> If you find that more than one method of treatment for Kim Nowatske's injuries is recognized, then Dr. Osterloh was at liberty to select any of the recognized methods. Dr. Osterloh was not negligent merely because he made a choice of a recognized alternative method of treatment if he used the required care, skill, and judgment in administering the method. This is true even though other medical witnesses may not agree with him on the choice that was made. . . .

The plaintiff's principal objection to [the first] paragraph is that it defines the standard of care as that care usually exercised by the average physician practicing within the same specialty. According to the plaintiff the instruction thus equates the reasonable care required by law with customary medical care as defined by the medical profession, regardless of whether what is customary in the profession reflects what is reasonable in the wake of current medical science.

Because the medical profession is allowed to set its own definition of reasonable behavior in accordance with the customs of the profession, argues the plaintiff, what counts as an exercise of due care is established as a matter of law by doctors rather than as an issue to be resolved by the jury. Under Wis JI-Civil 1023, the plaintiff continues, all a defendant doctor need do is demonstrate that the methods used in treating the patient were customary in the medical profession. Even if the challenged custom is unreasonable and outdated, claims the plaintiff, the fact that it is "usually exercised in the same or similar circumstances by the average physician" is sufficient to shield clearly negligent conduct and negligent practitioners from liability.

The plaintiff is correct in suggesting that physicians, like all others in this state, are bound by a duty to exercise due care. Every person in Wisconsin must conform to the standard of a reasonable person under like circumstances; so too, then, "[t]he duty of a physician or surgeon is to exercise ordinary care." Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 11, 227 N.W.2d 647 (1975). As the amicus brief of the State Medical Society of Wisconsin correctly states, "the basic standard — ordinary care — does not change when the defendant is a physician. The only thing that changes is the makeup of the group to which the defendant's conduct is compared."

The Medical Society's characterization of how the law gauges whether physicians have met their duty of ordinary care is correct. Generally a determination of negligence involves comparing an alleged tortfeasor's standard of care with "the degree of care which the great mass of mankind exercises under the same or similar circumstances." Wis JI-Civil 1005. When a claim arises out of highly specialized conduct requiring professional training, however, the alleged tortfeasor's conduct is compared with the conduct of others who are similarly situated and who have had similar professional training.

Thus physicians are required to exercise ordinary care, a standard to which they have been held since early Wisconsin case law. In Reynolds v. Graves, 3 Wis. 371 [416],

375-76 [421-22] (1854), a physician's duty of care was alternately expressed as the obligation "to use reasonable professional skill and attention" and "to use due and reasonable skill and diligence" in an effort to cure the patient. . . .

Both the amicus brief of the State Medical Society of Wisconsin and the defendant have acknowledged that the first paragraph of Wis JI-Civil 1023 requires that custom must be dynamic to be reasonable. As interpreted by the Medical Society, the portion of Wis JI-Civil 1023 which instructs the jury to judge the defendant's conduct with "due regard for the state of medical science at the time the plaintiff was treated" means that "[p]laintiffs can always, if appropriate, present evidence regarding the 'state of medical science' to show that a professional custom is obsolete or unreasonable." Brief for the State Medical Society of Wisconsin as Amicus Curiae at 3.

The defendant interprets the same jury instruction language as applying "a dynamic standard" to professionals because the standard "changes as the state of knowledge of the profession changes." Brief for Defendant at 17. "Absent a dynamic standard," the defendant continues, "the law could not adjust to changes and improvement in medical science." At oral argument before this court, counsel for the defendant stated that if a particular custom in the medical profession failed to keep pace with what developments in medical science had rendered reasonable, the plaintiff could introduce evidence demonstrating that the custom in question constituted negligent conduct.

We agree with the parties and the Medical Society that while evidence of the usual and customary conduct of others under similar circumstances is ordinarily relevant and admissible as an indication of what is reasonably prudent, customary conduct is not dispositive and cannot overcome the requirement that physicians exercise ordinary care. . . .

We recognize that in most situations there will be no significant difference between customary and reasonable practices. In most situations physicians, like other professionals, will revise their customary practices so that the care they offer reflects a due regard for advances in the profession. An emphasis on reasonable rather than customary practices, however, insures that custom will not shelter physicians who fail to adopt advances in their respective fields and who consequently fail to conform to the standard of care which both the profession and its patients have a right to expect.

The issue then is whether the first paragraph of the instruction conveys the correct legal message that the defendant is held to a standard of reasonable care, skill and judgment and that reasonable care, skill and judgment are not necessarily embodied by the customary practice of the profession but rather represent the practice of physicians who keep abreast of advances in medical knowledge.

We conclude that the first paragraph of Wis JI-Civil 1023, read in conjunction with the remainder of the instructions given, conveys this message. The first paragraph speaks of the degree of care, skill, and judgment usually exercised in the same or similar circumstances by the average specialist. The second paragraph expressly states that a physician must use reasonable care. The third paragraph cautions that even a physician who has chosen a recognized method of treatment can nevertheless be found negligent for failing to exercise "the required care, skill, and judgment in administering the method" chosen. And much like the first paragraph of the plaintiff's proposed instruction, the first paragraph of the instruction given requires that in determining the degree of care, skill and judgment required of a physician, "due regard" should be given to "the

state of medical science." The phrase "due regard for the state of medical science" tells the jury that a reasonably competent practitioner is one who keeps up with advances in medical knowledge. . . .

To sum up, we conclude that these three paragraphs of Wis JI-Civil 1023, read as a whole and in conjunction with the other instructions given in this case, were not erroneous. . . .

For the reasons set forth we remand the cause to the court of appeals for further proceedings consistent with this opinion.

NOTES TO NOWATSKE v. OSTERLOH

1. *Juror Freedom Under the Approved Jury Instruction.* The court states that custom should not shelter physicians who fail to adopt advances in their fields. How would the quoted jury charge enable a juror to find such a physician liable if failure to adopt an advance injured a patient?

2. *Clarity of Standard.* Describing the *Nowatske* holding is difficult, because the opinion offers a variety of statements about the proper standard for physicians' conduct:

> customary conduct is not dispositive and cannot overcome the requirement that physicians exercise ordinary care.
>
> defendant is held to a standard of reasonable care, skill and judgment . . . a reasonably competent practitioner is one who keeps up with advances in medical knowledge.
>
> reasonable care, skill and judgment . . . represent the practice of physicians who keep abreast of advances in medical knowledge.

Does the *Nowatske* court approve the jury instruction because it defines "reasonable physician" as one who keeps up with advances in medical knowledge, or because it defines "reasonable care" as the practice of physicians who keep abreast of advances in medical knowledge? To establish unreasonable conduct, must a plaintiff show that a physician's conduct differed from the conduct of "physicians who keep abreast of advances"?

3. *Compliance with Custom as a Complete Defense.* How does *Nowatske* compare with *Osborn* (the previous case) on whether compliance with custom is a complete defense in a professional malpractice case? In Philip P. Peters, Jr., *The Role of the Jury in Modern Malpractice Law,* 87 Iowa L. Rev. 909 (2002), the author reports that eleven states and the District of Columbia have expressly rejected the traditional view of compliance with custom as a complete defense, and that nine other states have adopted a reasonable physician standard while not addressing the effect of proof of compliance with custom.

4. *Schools of Thought.* The jury charge discussed in *Nowatske* indicates that a physician is at liberty to select any "recognized alternative method" even if some medical witnesses disagree with that choice. Some jurisdictions refer to this idea with the expression "schools of thought," holding that compliance with any recognized school of thought satisfies the professional standard. Does the language of the charge with respect to alternative methods support the claim that the professional standard allows the medical profession to set its own standards?

5. *Judicial Standard-Setting.* In a well-known case, a plaintiff sought to show that had the defendant doctor included a simple test in a routine eye examination, the plaintiff would have had an early warning of a serious disease. The defendant physician did not include the test because it was the professional custom to perform it only for patients significantly older than the plaintiff. In Helling v. Carey, 519 P.2d 981 (Wash. 1974), the court reversed a directed verdict won by the defendant in the trial court. The court noted that the risks the test could avert were grave, and the costs of the test were low. See also Gates v. Jensen, 595 P.2d 919 (Wash. 1979), in which the Washington court interpreted a statute enacted in response to its decision in *Helling.* The court concluded that the statute permitted a holding that reasonable prudence by a professional might require greater care than the care typically exercised by a relevant professional group.

Perspective: Custom-Based Standards

As one article claims,

> The prospect of a widespread retreat from the custom-based standard of care has obvious policy implications. On the one hand, abandonment of the custom-based standard will enable judges and juries to police the practices of physicians facing intense pressure to cut costs. On the other hand, it may demand more of lay jurors than we can reasonably expect of them. And if, as some suspect, juries are unwilling to allow physicians and managed care organizations to be cost-conscious, then jury standard-setting could threaten efforts to keep health care affordable. The choice between these two rival standards is made more difficult by the fact that each has serious shortcomings. Juries may misuse statistical proof evidence, may be susceptible to hindsight bias, and may penalize responsible efforts to keep health care costs under control. Sadly, the evidence regarding medical customs is no less disappointing. Research on physician behavior has revealed that physicians, like the rest of us, are vulnerable to self-interest, habit, and other competing influences. Customs vary inexplicably from one location to another. In addition, market imperfections so permeate health care delivery that competition cannot be trusted to discipline medical customs.

Phillip G. Peters Jr., *The Role of the Jury in Modern Malpractice Law,* 87 Iowa L. Rev. 909 (2002).

ROSSELL v. VOLKSWAGEN OF AMERICA

147 Ariz. 160, 709 P.2d 517 (1985)

FELDMAN, J.

This is a product liability action brought by Phyllis A. Rossell, as guardian ad litem on behalf of her daughter, Julie Ann Kennon (plaintiff), against the manufacturer and the North American distributor of Volkswagen automobiles. The defendants will be referred to collectively as "Volkswagen." The case involves the design of the battery

system in the model of the Volkswagen automobile popularly known as the "Beetle" or "Bug." The jury found for the plaintiff and awarded damages in the sum of $1,500,000. The court of appeals held that the plaintiff had failed to establish a prima facie case of . . . negligence . . . and that the trial judge had erred in denying Volkswagen's motion for judgment n.o.v. Believing that the court of appeals had incorrectly stated the applicable law with respect to both issues, we granted review. . . .

We view the facts in the light most favorable to the party who prevailed at trial. . . . This action arises from a 1970, one-vehicle accident. At the time of the accident Julie, then eleven months old, was sleeping in the front passenger seat of a 1958 Volkswagen driven by her mother. At approximately 11:00 p.m., on State Route 93, Ms. Rossell fell asleep and the vehicle drifted to the right, off the paved roadway. The sound of the car hitting a sign awakened Rossell, and she attempted to correct the path of the car, but oversteered. The car flipped over, skidded off the road and landed on its roof at the bottom of a cement culvert. The force of the accident dislodged and fractured the battery which was located inside the passenger compartment. In the seven hours it took Rossell to regain full consciousness and then extract herself and her daughter from the car, the broken battery slowly dripped sulfuric acid on Julie. The acid severely burned her. . . .

Plaintiff filed the complaint in May, 1978. She alleged . . . negligent design of the battery system. . . .

Plaintiff argued at trial that battery placement within the passenger compartment created an unreasonable risk of harm and that alternative designs were available and practicable. In their trial motions and later motion for judgment n.o.v., Volkswagen argued that plaintiff had failed to make a prima facie case. First, it claimed that in a negligent design case the defendant must comply with the standard of a reasonably prudent designer of automobiles and that

> knowledge of automobile design principles and engineering practices often is beyond the knowledge of laymen, [so that] plaintiff in a case such as this must produce expert testimony establishing the minimum standard of care and deviation therefrom in designing the automobile. . . .

Concluding its argument, Volkswagen pointed out that plaintiff produced no testimony

> expert or otherwise, [to] describe what was expected of [or done by] a reasonable automobile designer or manufacturer in 1958 or . . . that defendants failed to meet [that] standard of care. . . .

The trial judge characterized Volkswagen's position as a contention that plaintiff could not prevail

> in the absence of testimony . . . from a qualified expert as opposed to simply permitting the jury to infer it, . . . that the standard of care required of a prudent manufacturer would require that the battery be placed elsewhere [or that] it was negligent . . . not to have placed it outside of the passenger compartment. . . .

The trial judge disagreed with Volkswagen and denied the motion for judgment n.o.v. However, a majority of the court of appeals held that such evidence was required for a prima facie case. . . .

We turn, then, to the central issue presented. What type of proof must plaintiff produce in order to make a prima facie case of negligent design against a product

manufacturer? What is the standard of care? In the ordinary negligence case, tried under the familiar rubric of "reasonable care," plaintiff's proof must provide facts from which the jury may conclude that defendant's behavior fell below the "reasonable man" standard. . . .

Volkswagen claims that negligent design cases are an exception. They contend that product manufacturers are held to an expert's standard of care, as are professionals such as lawyers, doctors and accountants. In professional malpractice cases the reasonable man standard has been replaced with the standard of "what is customary and usual in the profession." [W. Prosser & W. Keeton, *The Law of Torts* §32 at 189 (5th ed. 1984).] This, of course, requires plaintiff to establish by expert testimony the usual conduct of other practitioners of defendant's profession and to prove, further, that defendant deviated from that standard.

It has been pointed out often enough that this gives the

> medical profession, and also the [other professions], the privilege, *which is usually emphatically denied to other groups*, of setting their own legal standards of conduct, merely by adopting their own practices.

Id. (emphasis supplied) (citations omitted).

Should we adopt for manufacturers in negligent design cases a rule "emphatically denied to other groups" but similar to those applied to defendants in professional malpractice cases? Such a rule, of course, would require — not just permit — plaintiff to present explicit evidence of the usual conduct of other persons in the field of design by offering expert evidence of what constitutes "good design practice." Plaintiff would also be required to establish that the design adopted by the defendant deviated from such "good practice." We believe that such a rule is inappropriate.

The malpractice requirement that plaintiff show the details of conduct practiced by others in defendant's profession is not some special favor which the law gives to professionals who may be sued by their clients. It is, instead, a method of holding such defendants to an even higher standard of care than that of an ordinary, prudent person. . . . Such a technique has not been applied in commercial settings, probably because the danger of allowing a commercial group to set its own standard of what is reasonable is not offset by professional obligations which tend to prevent the group from setting standards at a low level in order to accommodate other interests. Thus, it is the general law that industries are not permitted to establish their own standard of conduct because they may be influenced by motives of saving "time, effort or money." Prosser, supra §33 at 194. . . .

In view of public policy and existing law, we decline to transform defective design cases into malpractice cases. We believe the law is best left as it is in this field. Special groups will be allowed to create their own standards of reasonably prudent conduct only when the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability. We do not believe that automobile manufacturers fit into this category. This is no reflection upon automobile manufacturers, but merely a recognition that the necessities of the marketplace permit manufacturers neither the working relationship nor the concern about the welfare of their customers that the professions generally permit and require from their practitioners.

Therefore, in Arizona the rule in negligence cases shall continue to be that evidence of industry custom and practice is generally admissible as evidence relevant to whether

defendant's conduct was reasonable under the circumstances. In determining what is reasonable care for manufacturers, the plaintiff need only prove the defendant's conduct presented a foreseeable, unreasonable risk of harm. As in all other negligence cases, the jury is permitted to decide what is reasonable from the common experience of mankind. We do not disturb the rule that in determining what is "reasonable care," expert evidence may be required in those cases in which factual issues are outside the common understanding of jurors. . . . However, unlike most malpractice cases, there need not be explicit expert testimony establishing the standard of care and the manner in which defendant deviated from that standard. . . . With these principles in mind, we now turn to a consideration of the evidence in order to determine whether plaintiff did prove a prima facie case.

Plaintiff presented two experts, Jon McKibben, an automotive engineer, and Charles Turnbow, a safety engineer. Their testimony established that the great majority of cars on the road at the time the Beetle in question was designed had batteries located outside the passenger compartment, usually in the engine compartment and occasionally in the luggage compartment. There was evidence from which the jury could find that from both an engineering and practical standpoint the 1958 Volkswagen could have been designed with the battery outside the passenger compartment, as was the Karmann Ghia, an upscale model which used the same chassis as the Beetle. There was further testimony that placement of the battery inside the passenger compartment was unreasonably dangerous because "batteries do fracture in crashes, not infrequently." . . .

We conclude that the plaintiff did present expert evidence that the battery design location presented a foreseeable, unreasonable risk of harm, that alternative designs were available and that they were feasible from a technological and practical standpoint. We reject Volkswagen's contention that in addition to the evidence outlined above, plaintiff was compelled to produce expert opinion evidence that the standard of "good design practice" required Volkswagen to design the car so that the battery system was located outside the passenger compartment. Unlike a malpractice case, the jury was free to reach or reject this conclusion on the basis of its own experience and knowledge of what is "reasonable," with the assistance of expert opinion describing only the dangers, hazards and factors of design involved. . . .

We hold that plaintiff did make a prima facie case of negligence. . . . The trial court did not err in failing to direct a verdict or grant judgment n.o.v. . . .

The opinion of the court of appeals is vacated. The judgment is affirmed.

NOTES TO ROSSELL v. VOLKSWAGEN OF AMERICA

1. ***Eligibility for Professional Standard.*** The *Rossell* court states that the professional standard should be used when "the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability."

An alternative approach to determining whether a person should be judged by the professional standard of care applies standards from federal statutes such as the National Labor Relations Act and the Fair Labor Standards Act. See Lewis v. Rodriquez, 759 P.2d 1012, 1014-15 (N.M. App. 1988). The National Labor Relations Act defines work as professional if four requirements are met: the work must be predominantly intellectual

and nonroutine, must involve the consistent exercise of discretion and judgment, must not be standardized in terms of time, and must require knowledge customarily acquired by specialized study in an institution of higher learning.

How do the factors used in these two approaches relate to engineers in the field of automobile design?

2. *Professionals Other Than Doctors, Lawyers, and Accountants.* Many courts have applied the professional standard to work in a wide range of fields. For example, Montana courts use that standard for cases involving doctors, dentists, and orthodontists; manufacturers and distributors of pharmaceuticals; abstractors of title; veterinarians; and "professional counselors." See Newville v. Department of Family Services, 267 Mont. 237, 883 P.2d 793 (1993).

3. *Problem: Attributes of a Profession.* Plaintiff underwent a polygraph examination in connection with his employment. The polygraph examiner gave a report to Plaintiff's employer that led to Plaintiff being fired from his job. If Plaintiff claims that the polygraph examiner was careless in administering a polygraph exam, would the *Rossell* guidelines call for evaluating the polygraph examiner's conduct with a professional standard or a reasonable prudent person standard? See Lewis v. Rodriguez, 107 N.M. 430, 759 P.2d 1012 (1988).

4. *Problem: Non-"Professional" Work in a Professional Setting.* Plaintiff was injured in a traffic accident and taken to HealthCenter Hospital, a private for-profit hospital. Emergency room personnel determined that he might have injuries that could be diagnosed with a CAT-scan. Plaintiff was taken to the CAT-scan department, but had to wait almost two hours to be examined, because other patients with similarly serious conditions were being examined first. The CAT-scan showed that Plaintiff had a serious injury. Proper treatment was begun for the injury as soon as it was diagnosed, but Plaintiff suffered permanent debilitating consequences from that injury.

Plaintiff has discovered the following facts:

1. If treatment for his injury had begun about an hour sooner, its permanent effects would likely have been much less severe.
2. HealthCenter's CAT-scan machine was about ten years old. Newer models work more rapidly than the one HealthCenter used but are more expensive to buy and maintain.
3. At HealthCenter Hospital, decisions about what types of equipment to buy and how often to replace equipment are made by executives trained in the management of large enterprises and experienced in the management of hospitals. These executives do not have medical degrees (each of them has an M.B.A.), but they consult with physicians when they plan the hospital's budget.
4. Many hospitals that are similar to HealthCenter Hospital in terms of size and types of patients typically treated use CAT-scan machines that are newer than HealthCenter's, although some use machines similar to HealthCenter's.

What issues would be raised if Plaintiff sought damages from HealthCenter, claiming that it had been negligent in failing to buy and operate a newer CAT-scan machine? In particular, should that decision be evaluated in the context of a professional standard, a standard that was drawn from practices of similar hospitals, or a reasonable person standard?

III. Applying the Professional Standard in Medical Cases

A. Geographic Scope of Professional Standard

In its earliest forms, the professional standard referred to practice by professionals in the same community as the defendant professional. Vergara v. Doan and the statutes that follow it show that jurisdictions currently take a range of positions on the basic question: Should a doctor be required to act as well as other doctors in his or her *locality*, or should a doctor's conduct be measured against a *national standard of care*?

VERGARA v. DOAN

593 N.E.2d 185 (Ind. 1992)

SHEPARD, C.J.

Javier Vergara was born on May 31, 1979, at the Adams Memorial Hospital in Decatur, Indiana. His parents, Jose and Concepcion, claimed that negligence on the part of Dr. John Doan during Javier's delivery caused him severe and permanent injuries. A jury returned a verdict for Dr. Doan and the plaintiffs appealed. The Court of Appeals affirmed. Plaintiffs seek transfer, asking us to abandon Indiana's modified locality rule. We grant transfer to examine the standard of care appropriate for medical malpractice cases.

In most negligence cases, the defendant's conduct is tested against the hypothetical reasonable and prudent person acting under the same or similar circumstances. In medical malpractice cases, however, Indiana has applied a more specific articulation of this standard. It has become known as the modified locality rule: "The standard of care . . . is that degree of care, skill, and proficiency which is commonly exercised by ordinarily careful, skillful, and prudent [physicians], at the time of the operation and in similar localities." Appellants have urged us to abandon this standard, arguing that the reasons for the modified locality rule are no longer applicable in today's society. We agree.

The modified locality rule is a less stringent version of the strict locality rule, which measured the defendant's conduct against that of other doctors in the same community. When the strict locality rule originated in the late 19th century, there was great disparity between the medical opportunities, equipment, facilities, and training in rural and urban communities. Travel and communication between rural and urban communities were difficult. The locality rule was intended to prevent the inequity that would result from holding rural doctors to the same standards as doctors in large cities.

With advances in communication, travel, and medical education, the disparity between rural and urban health care diminished and justification for the locality rule waned. The strict locality rule also had two major drawbacks, especially as applied to smaller communities. First, there was a scarcity of local doctors to serve as expert witnesses against other local doctors. Second, there was the possibility that practices among a small group of doctors would establish a local standard of care below that which the law required. In response to these changes and criticisms, many courts adopted a modified locality rule, expanding the area of comparison to similar localities. This is the standard applied in Indiana.

Use of a modified locality rule has not quelled the criticism. See Brent R. Cohen, *The Locality Rule in Colorado: Updating the Standard of Care*, 51 U. Colo. L. Rev. 587 (1980) (urging a standard based on medical resources available to the doctor under the circumstances in which patient was treated). Many of the common criticisms seem valid. The modified locality rule still permits a lower standard of care to be exercised in smaller communities because other similar communities are likely to have the same care. We also spend time and money on the difficulty of defining what is a similar community. . . . The rule also seems inconsistent with the reality of modern medical practice. The disparity between small town and urban medicine continues to lessen with advances in communication, transportation, and education. In addition, widespread insurance coverage has provided patients with more choice of doctors and hospitals by reducing the financial constraints on the consumer in selecting caregivers. These reasons and others have led our Court of Appeals to observe that the modified locality rule has fallen into disfavor. . . . Many states describe the care a physician owes without emphasizing the locality of practice. Today we join these states and adopt the following: a physician must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which he belongs, acting under the same or similar circumstances. Rather than focusing on different standards for different communities, this standard uses locality as but one of the factors to be considered in determining whether the doctor acted reasonably. Other relevant considerations would include advances in the profession, availability of facilities, and whether the doctor is a specialist or general practitioner. . . .

We now turn to whether the instruction given at trial, legally correct at the time, requires a reversal in light of our decision today. . . .

We regard our new formulation of a doctor's duty as a relatively modest alteration of existing law. It is unlikely to have changed the way this case was tried. We are satisfied that an instruction without the locality language would not lead a new jury to a different conclusion.

Therefore, we hold that giving [a modified locality rule instruction] was harmless and does not require reversal. In a different factual situation, however, an erroneous instruction with the locality language present might well constitute reversible error. The standard that we set out today, without the locality language, should be used from today forward.

NOTES TO VERGARA v. DOAN

1. *Comparing Standards.* The *Vergara* court describes three standards: the strict locality rule, the modified locality rule, and a national standard. How does the court say that they differ?

2. *Local Conditions and the National Standard.* Courts that apply a national standard of care do not require a physician in a rural area to use diagnostic equipment that is available in urban centers but unavailable in the rural locale. How does the *Vergara* court attempt to integrate the attributes of local circumstances into the national standard it adopts?

3. *Availability of Expert Witnesses.* The *Vergara* court refers to the availability of witnesses as one reason for adopting the national standard. The national standard allows testimony, for example, by a medical school professor from one state in a

trial involving a physician who practiced in another state. That professor would likely be barred from testifying about the standard of care in a state other than his or her own if that state applied the strict locality rule.

4. *Cost of the Locality Rule.* Among its reasons for abrogating the modified locality rule, the *Vergara* court stated that defining "similar community" had cost time and money in the past. How does that idea relate to the court's other reasons for changing the rule? If high cost were the only drawback to a rule, would that be a reason for eliminating it?

Statute: STANDARD OF ACCEPTABLE PROFESSIONAL PRACTICE

Mich. Comp. Laws §600.2912a (2002)

ACTION ALLEGING MALPRACTICE; BURDEN OF PROOF, STANDARD OF ACCEPTABLE PROFESSIONAL PRACTICE AND STANDARD OF CARE

Sec. 2912a. (1) Subject to subsection (2), in an action alleging malpractice, the plaintiff has the burden of proving that in light of the state of the art existing at the time of the alleged malpractice:

(a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

(b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

Statute: COMMUNITY STANDARD

Idaho Code §6-1012 (2002)

PROOF OF COMMUNITY STANDARD OF HEALTH CARE PRACTICE IN MALPRACTICE CASE

In any case, claim or action for damages due to injury to or death of any person, brought against any physician and surgeon or other provider of health care, including, without limitation, any dentist, physicians' assistant, nurse practitioner, registered nurse, licensed practical nurse, nurse anesthetist, medical technologist, physical therapist, hospital or nursing home, or any person vicariously liable for the negligence of them or any of them, on account of the provision of or failure to provide health care or on account of any matter incidental or related thereto, such claimant or plaintiff must, as an essential part of his or her case in chief, affirmatively prove by direct expert testimony and by a preponderance of all the competent evidence, that such defendant then and there negligently failed to meet the applicable standard of health care practice of the community in which such care allegedly was or should have been provided, as such standard existed at the time and place of the alleged negligence of such physician and surgeon, hospital or other such health care provider and as such standard then and there existed with respect to the class of health care provider that such defendant then

and there belonged to and in which capacity he, she or it was functioning. Such individual providers of health care shall be judged in such cases in comparison with similarly trained and qualified providers of the same class in the same community, taking into account his or her training, experience, and fields of medical specialization, if any. If there be no other like provider in the community and the standard of practice is therefore indeterminable, evidence of such standard in similar Idaho communities at said time may be considered. As used in this act, the term "community" refers to that geographical area ordinarily served by the licensed general hospital at or nearest to which such care was or allegedly should have been provided.

NOTE TO STATUTES

Universe of Available Witnesses. The choice between a strict locality rule, a similar locality rule, and a national standard affects the ability of parties to find physicians to provide expert testimony. How do the requirements of the Michigan and Idaho statutes affect the number of expert witnesses who might be available for plaintiffs or defendants?

Perspective: Legislative and Judicial Roles

Why should legislatures set rules for expert testimony in medical malpractice cases when issues of the qualifications of expert witnesses in other types of cases are typically left to the discretion of trial judges (controlled by appellate precedents or evidence rules of general application)? Malpractice cases are easy to identify. They represent a significant component of tort litigation. Health care is an important topic in the minds of voters and legislators. Do any of those aspects of this issue make it desirable for legislatures to act on it?

B. Common Knowledge

In some medical malpractice cases, the alleged substandard care is nontechnical in nature. Cases within the range of *laypeople's knowledge* may go to the jury in the absence of expert testimony about the professional standard. McGraw v. St. Joseph's Hospital applies the general rule: Is the deployment of nursing staff something lay people can understand, or is it so related to the practice of medicine and scientific judgments that the jury must be informed about professional standards for it?

McGRAW v. ST. JOSEPH'S HOSPITAL

488 S.E.2d 389 (W. Va. 1997)

DAVIS, J.

This is an appeal by Robert S. McGraw, plaintiff below, from a summary judgment order of the Circuit Court of Wood County dismissing his complaint against the

defendant below, St. Joseph's Hospital. On appeal the plaintiff argues that the circuit court committed error in granting summary judgment on the grounds that medical expert testimony was required to show the defendant violated the standard of care in its treatment of him. . . .

The facts of this case are straightforward, though some critical points remain in dispute. On May 10, 1991 the plaintiff walked into the defendant's emergency room complaining of shortness of breath. After several hours of waiting to be seen by medical personnel, the plaintiff was admitted into the hospital. On the morning of May 11, four female hospital personnel attempted to assist the plaintiff back into bed. The plaintiff testified during his deposition that he informed the four women that he did not believe they could put him in bed because he weighed too much.[3] The plaintiff's memory of what happened immediately after making that statement is minimal. He testified that all he could remember is that he "had a sensation of falling." During the early morning hours of May 12 the plaintiff was discovered on the floor near his bed. The plaintiff indicated in his deposition that he fell out of bed. The plaintiff further testified that on the afternoon of May 21, four female nurses and nurse's aides dropped him while attempting to place him in bed. He stated that "they had to get men to put me—get me up and put me in bed after they had dropped me[.]" The plaintiff was eventually discharged from the hospital on June 28, 1991.

[T]he plaintiff filed the instant action against the defendant. The complaint charged the defendant with dropping or permitting him to fall on two occasions. It was also alleged that he sustained "a fractured neck and other injuries in, about and upon his arms, knees and other parts of his body" as a result of both incidents. After discovery in the case, the defendant moved for summary judgment "premised upon the failure of McGraw to produce expert testimony demonstrating that the hospital deviated from the standard of care and that any deviation caused injury or damage to McGraw."

[T]he circuit court granted the defendant's motion for summary judgment on the grounds that "West Virginia law requires that a violation of the standard of care by a health care provider be proven by expert testimony," but that the plaintiff "is unable to produce expert testimony as to any violation of the standard of care by the Hospital[.]" This appeal followed. We reverse. . . .

We pointed out in Neary v. Charleston Area Medical Center, Inc., 194 W. Va. 329, 334, 460 S.E.2d 464, 469 (1995) that "[w]hen the principles of summary judgment are applied in a medical malpractice case, one of the threshold questions is the existence of expert witnesses opining the alleged negligence." Defendant takes the position that medical expert testimony was mandatory in this case pursuant to W. Va. Code §55-7B-7 (1986), which provides in relevant part:

> The applicable standard of care and a defendant's failure to meet said standard, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court.

In granting the defendant summary judgment in this case, the circuit court did not cite the above statute. The circuit court held that our law required "a violation of the

[3] The record is not clear as to the exact weight of the plaintiff. It appears that he weighed somewhere between 280 to 306 pounds.

standard of care by a health care provider be proven by expert testimony[.]" We address the meaning of the above quoted passage from W. Va. Code §55-7B-7.

Our traditional rule of statutory construction is set out in syllabus point 2 of Keen v. Maxey, 193 W. Va. 423, 456 S.E.2d 550 (1995) as follows:

> When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute. Point 1, syllabus, State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al., 148 W. Va. 369 [135 S.E.2d 262 (1964)]. . . .

We hold that W. Va. Code §55-7B-7 provides that circuit courts have discretion to require expert testimony in medical professional liability cases. . . .

We note some general principles that our prior cases have developed in this area. In syllabus point 1 of Farley [v. Meadows, 185 W. Va. 48, 404 S.E.2d 537 (1991),] we stated that "'[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.' Syl. pt. 2, Roberts v. Gale, 149 W. Va. 166, 139 S.E.2d 272 (1964)."

In Totten v. Adongay, 175 W. Va. 634, 638, 337 S.E.2d 2, 6 (1985), the Court stated that "cases may arise where there is such want of skill as to dispense with expert testimony." Quoting, in part, Syl., Buskirk v. Bucklew, 115 W. Va. 424, 176 S.E. 603 (1934); Syl. pt. 2, Howell v. Biggart, 108 W. Va. 560, 152 S.E. 323 (1930). We held in syllabus point 4 of *Totten* that:

> In medical malpractice cases where lack of care or want of skill is so gross, so as to be apparent, or the alleged breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience, failure to present expert testimony on the accepted standard of care and degree of skill under such circumstances is not fatal to a plaintiff's prima facie showing of negligence.

Totten recognizes what is known as the "common knowledge" exception to expert testimony.

Was expert testimony necessary in this case? The defendant takes the position that the common knowledge exception is not applicable here, because "liability is premised upon complex medical management issues involving professional management." We have reviewed cases addressing hospital fall incidents and found that a majority of jurisdictions do not require expert testimony in such cases. . . .

In Cramer v. Theda Clerk Memorial Hospital, 45 Wis. 2d 147, 172 N.W.2d 427, 428 (1969) the Wisconsin Supreme Court articulated the rationale used by jurisdictions that generally do not require expert testimony in hospital fall cases:

> Courts generally make a distinction between medical care and custodial care or routine hospital care. The general rule is that a hospital must in the care of its patients exercise such ordinary care and attention for their safety as their mental and physical condition, known or should have been known, may require. . . . If the patient requires professional nursing or professional hospital care, then expert testimony as to the standard of that type of care is necessary. . . . But it does not follow that the standard of all care and attention rendered by nurses or by a hospital to its patients necessarily require proof by expert testimony. The standard of nonmedical, administrative, ministerial or routine care in a hospital need not be established by expert testimony

because the jury is competent from its own experience to determine and apply such a reasonable-care standard.

(Citations omitted).

We find the reasoning of *Cramer* persuasive and consistent with the direction of our law in this area. . . . Although the defendant has contended on appeal that complex management issues are involved in this case, the defendant has not articulated such issues. Because the circuit court erroneously assumed that our law makes it mandatory that expert testimony be proffered in all medical professional liability cases, the court did not make a finding on whether complex management issues existed in this case which would necessitate expert testimony. On remand the circuit court is directed to determine, before the trial of this case, whether complex management issues are involved in the May 21 incident only. As we explain below, the May 12 incident where Mr. McGraw fell out of his hospital bed is ripe for trial on the merits. . . .

[With regard to the May 12 incident, the circuit court concluded that the plaintiff had failed to provide expert testimony. That conclusion was wrong because a deposition by an expert witness for the plaintiff did describe a standard of care for that incident and did state that the defendant violated that standard.] This case is reversed and remanded for a determination by the trial court consistent with this opinion.

NOTES TO McGRAW v. ST. JOSEPH'S HOSPITAL

1. *Common Knowledge.* The trial court was influenced by the erroneous idea that all medical cases require expert testimony. How does the West Virginia Supreme Court instruct the trial court to determine if this plaintiff's claim is the type of medical claim for which expert testimony is needed?

2. *Problem: Common Knowledge and Patient Care.* Employees of a nursing home were aware that one of its residents was unable to feed herself properly and that she had suffered serious choking incidents when she tried to do so. The resident choked to death on food after a nurse brought her a tray of food and neglected to assist her in eating it. In a malpractice claim, would the plaintiff be required to introduce expert testimony about nursing home staffing practices or proper care for individuals who are subject to choking? See Beverly Enterprises-Virginia v. Nichols, 441 S.E.2d 1 (Va. 1994).

3. *Problem: Common Knowledge and Supplies Management.* A patient's hip replacement surgery had to be stopped because the artificial hip ordered by the surgeon had not been received prior to the start of the operation. The plaintiff contended that hospital personnel had been negligent in failing to be sure that the proper item had been delivered. Is this a case where expert testimony on hospital procedures should be required? See Dalton v. Kalispell Regional Hospital, 846 P.2d 960 (Mont. 1993).

Statute: PRESUMPTION OF NEGLIGENCE

Nev. Rev. Stat. §41A.100 (2002)

EXPERT TESTIMONY REQUIRED; EXCEPTIONS; REBUTTABLE PRESUMPTION OF NEGLIGENCE

1. Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless

evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:

(a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;

(b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;

(c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;

(d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or

(e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

2. As used in this section, "provider of medical care" means a physician, registered nurse or a licensed hospital as the employer of any such person.

NOTES TO STATUTE

1. *Effect of Detailed Provisions.* This Nevada statute provides a list of detailed provisions. What is the consequence of that approach for a case involving something not specified, such as the dropping of a patient in *McGraw?*

2. *Hypothetical: Application of Statute.* A patient recovering from hand surgery suffered an electric shock and consequential burn from a defective push button on a device provided by the hospital to call for nursing assistance. Would the statute require expert medical testimony in a suit against a hospital based on this claim?

Perspective: Malpractice Litigation and the Quality of Medical Care

Some question whether malpractice litigation can improve the quality of medical care. Some people believe that the interest in helping people is a much stronger incentive for most doctors than the interest in avoiding financial liability. It is also likely that most medical mistakes never become the subject of litigation, and that when litigation does occur, the specific financial impact on a defendant doctor is likely to be small, because of insurance. These factors may weaken the ability of the tort system as a force for improving quality. A related question is whether the possibility of litigation impairs quality improvement efforts. Do doctors avoid discussing errors with their peers because of fear of litigation? For a review of these issues, and a proposal for nonlitigation treatment of medical injuries, see P. Weiler, *Medical Malpractice on Trial* (1991).

C. *Informed Consent*

All courts agree that doctors must obtain *informed consent* from their patients before performing procedures on them. They disagree about the standard for judging whether a doctor has provided enough information to a patient to satisfy the informed consent process. Largey v. Rothman compares two rules on whether doctors should disclose the risks that doctors consider important or the risks that patients consider important.

LARGEY v. ROTHMAN

110 N.J. 204, 540 A.2d 504 (1988)

PER CURIAM.

This medical malpractice case raises an issue of a patient's informed consent to treatment. The jury found that plaintiff Janice Largey had consented to an operative procedure performed by the defendant physician. The single question presented goes to the correctness of the standard by which the jury was instructed to determine whether the defendant, Dr. Rothman, had adequately informed his patient of the risks of that operation.

The trial court told the jury that when informing the plaintiff Janice Largey of the risks of undergoing a certain biopsy procedure, . . . defendant was required to tell her "what reasonable medical practitioners in the same or similar circumstances would have told their patients undertaking the same type of operation." [The defendant surgeon performed a breast biopsy on the plaintiff. There was a sharp dispute at trial over whether he stated that the biopsy would include the lymph nodes as well as the breast tissue. About six weeks after the operation, plaintiff developed a right arm and hand lymphedema, a swelling caused by inadequate drainage in the lymphatic system. The condition resulted from the excision of the lymph nodes. Defendant did not advise plaintiff of this risk. Plaintiff's experts testified that defendant should have informed plaintiff that lymphedema was a risk of the operation. Defendant's experts testified that it was too rare to be discussed with a patient.] By answer to a specific interrogatory on this point, the jurors responded that defendant had not "fail[ed] to provide Janice Largey with sufficient information so that she could give informed consent" for the operative procedure. On plaintiffs' appeal the Appellate Division affirmed in an unreported opinion, noting that the trial court's charge on informed consent followed the holding in Kaplan v. Haines, 96 N.J. Super. 242, 257, 232 A.2d 840 (App. Div. 1967), which this Court affirmed. . . .

Plaintiffs argued below, and repeat the contention here, that the proper standard is one that focuses not on what information a reasonable doctor should impart to the patient (the "professional" standard) but rather on what the physician should disclose to a reasonable patient in order that the patient might make an informed decision (the "prudent patient" or "materiality of risk" standard). The latter is the standard announced in Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), *cert. den.*, 409 U.S. 1064, 93 S. Ct. 560, 34 L. Ed. 2d 518 (1972). . . .

An early statement of the "informed consent" rule is found in Salgo v. Leland Stanford, Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (Dist. Ct. App. 1957), in which the court declared that "[a] physician violates his duty to his patient

and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment." . . .

Further development of the doctrine came shortly thereafter, in Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, modified on other grounds, 187 Kan. 186, 354 P.2d 670 (1960), which represented one of the leading cases on informed consent at that time. . . . The *Natanson* court established the standard of care to be exercised by a physician in an informed consent case as "limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances." At bottom the decision turned on the principle of a patient's right of self-determination:

> Anglo-American law starts with the premise of thorough self-determination. It follows that each man is considered to be master of his own body, and he may, if he be of sound mind, expressly prohibit the performance of life-saving surgery, or other medical treatment. . . .

After *Salgo* and *Natanson* the doctrine of informed consent came to be adopted and developed in other jurisdictions, which, until 1972, followed the "traditional" or "professional" standard formulation of the rule. Under that standard, as applied by the majority of the jurisdictions that adopted it, a physician is required to make such disclosure as comports with the prevailing medical standard in the community—that is, the disclosure of those risks that a reasonable physician in the community, of like training, would customarily make in similar circumstances. 2 D. Louisell and H. Williams, Medical Malpractice §22.08 at 22-23 (1987) (hereinafter Louisell and Williams). . . .

[T]he "professional" standard rests on the belief that a physician, and only a physician, can effectively estimate both the psychological and physical consequences that a risk inherent in a medial procedure might produce in a patient. The burden imposed on the physician under this standard is to "consider the state of the patient's health, and whether the risks involved are mere remote possibilities or real hazards which occur with appreciable regularity. . . ." Louisell and Williams, supra, §22.08 at 22-34. A second basic justification offered in support of the "professional" standard is that "a general standard of care, as required under the prudent patient rule, would require a physician to waste unnecessary time in reviewing with the patient every possible risk, thereby interfering with the flexibility a physician needs in deciding what form of treatment is best for the patient." Ibid. (footnotes omitted). . . .

In 1972 a new standard of disclosure for "informed consent" was established in Canterbury v. Spence, supra, 464 F.2d 772. The case raised a question of the defendant physician's duty to warn the patient beforehand of the risk involved in a laminectomy, a surgical procedure the purpose of which was to relieve pain in plaintiff's lower back, and particularly the risk attendant on a myelogram, the diagnostic procedure preceding the surgery. . . .

The *Canterbury* court announced a duty on the part of a physician to "warn of the dangers lurking in the proposed treatment" and to "impart information [that] the patient has every right to expect," as well as a duty of "reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved." Id. at 782. The court held that the scope of the duty to disclose

> must be measured by the patient's need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision

must be unmasked. And to safeguard the patient's interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure. [Id. at 786-787 (footnotes omitted).]

The breadth of the disclosure of the risks legally to be required is measured, under *Canterbury*, by a standard whose scope is "not subjective as to either the physician or the patient," id. at 787; rather, "it remains *objective* with due regard for the patient's informational needs and with suitable leeway for the physician's situation." Ibid. (emphasis added). A risk would be deemed "material" when a reasonable patient, in what the physician knows or should know to be the patient's position, would be "likely to attach significance to the risk or cluster of risks" in deciding whether to forgo the proposed therapy or to submit to it.

The foregoing standard for adequate disclosure, known as the "prudent patient" or "materiality of risk" standard, has been adopted in a number of jurisdictions. . . .

The jurisdictions that have rejected the "professional" standard in favor of the "prudent patient" rule have given a number of reasons in support of their preference. Those include:

(1) The existence of a discernible custom reflecting a medical consensus is open to serious doubt. . . .
(2) Since a physician in obtaining a patient's informed consent to proposed treatment is often obligated to consider non-medical factors, such as a patient's emotional condition, professional custom should not furnish the legal criterion for measuring the physician's obligation to disclose. . . .
(3) Closely related to both (1) and (2) is the notion that a professional standard is totally subject to the whim of the physicians in the particular community. Under this view a physician is vested with virtually unlimited discretion in establishing the proper scope of disclosure; this is inconsistent with the patient's right of self-determination. . . .
(4) The requirement that the patient present expert testimony to establish the professional standard has created problems for patients trying to find physicians willing to breach the "community of silence" by testifying against fellow colleagues. [Louisell and Williams, supra, §22.12 at 22-45 to 22-47 (footnotes omitted).]

Taken together, the reasons supporting adoption of the "prudent patient" standard persuade us that the time has come for us to abandon so much of the decision by which this Court embraced the doctrine of informed consent as accepts the "professional" standard. To that extent Kaplan v. Haines, 51 N.J. 404, 241 A.2d 235, *aff'g* 96 N.J. Super. 242, 232 A.2d 840, is overruled. . . .

Perhaps the strongest consideration that influences our decision in favor of the "prudent patient" standard lies in the notion that the physician's duty of disclosure "arises from phenomena apart from medical custom and practice": the patient's right of self-determination. *Canterbury*, supra, 464 F.2d at 786-87. The foundation for the physician's duty to disclose in the first place is found in the idea that "it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie." Id. at 781. In contrast the arguments for the "professional" standard smack of an anachronistic paternalism that is at odds with any strong conception of a patient's right of self-determination. Id. at 781, 784, 789. . . .

. . . We therefore align ourselves with those jurisdictions that have adopted *Canterbury*'s "prudent patient" standard.

Finally, we address the issue of proximate cause. As with other medical malpractice actions, informed-consent cases require that plaintiff prove not only that the physician failed to comply with the applicable standard for disclosure but also that such failure was the proximate cause of plaintiff's injuries. . . .

Under the "prudent patient" standard "causation must also be shown: i.e., that the prudent person in the patient's position would have decided differently if adequately informed." . . . As *Canterbury* observes,

> [t]he patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils. On the other hand, the very purpose of the disclosure rule is to protect the patient against consequences which, if known, he would have avoided by foregoing the treatment. The more difficult question is whether the factual issue on causality calls for an objective or a subjective determination.

Canterbury decided its own question in favor of an objective determination. The subjective approach, which the court rejected, inquires whether, if the patient had been informed of the risks that in fact materialized, he or she would have consented to the treatment. The shortcoming of this approach, according to *Canterbury*, is that it

> places the physician in jeopardy of the patient's hindsight and bitterness. It places the factfinder in the position of deciding whether a speculative answer to a hypothetical question is to be credited. It calls for a subjective determination solely on testimony of a patient-witness shadowed by the occurrence of the undisclosed risk.

The court therefore elected to adopt an objective test, as do we. Because we would not presume to attempt an improvement in its articulation of the reasons, we quote once again the *Canterbury* court:

> Better it is, we believe, to resolve the causality issue on an objective basis: in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance. . . . The patient's testimony is relevant on that score of course but it would not threaten to dominate the findings. And since that testimony would probably be appraised congruently with the factfinder's belief in its reasonableness, the case for a wholly objective standard for passing on causation is strengthened. Such a standard would in any event ease the fact-finding process and better assure the truth as its product. . . .

The judgment of the Appellate Division is reversed. The cause is remanded for a new trial consistent with this opinion.

NOTES TO LARGEY v. ROTHMAN

1. ***Basic Analysis.*** In all jurisdictions, to recover damages on an informed consent theory, the plaintiff must show that the defendant provided less information than the jurisdiction's standards required the defendant to provide, that there was a causal link between that lack of information and the patient's consent to treatment, and that the patient suffered an injury. *Largey* describes the range of positions jurisdictions have taken about defining what information should be given and about what proof of causation a plaintiff must provide.

2. *Reasonable Physician or Reasonable Patient.* What are the differences between the reasonable physician and reasonable patient standards for defining the information a physician must provide to a patient prior to treatment?

3. *Application of the Reasonable Patient Test.* The *Largey* court adopts the reasonable patient test, stating that it is supported by a number of factors, including doubt about whether customs really exist with regard to disclosures, the consideration of nonmedical factors in providing information, and the need for the law to support a patient's right of self-determination. How would those factors apply if a defendant physician in an informed consent case did not tell a patient about a particular risk because the physician did not realize it could occur in the proposed procedure? In that type of case, what standard of care should the jury use in evaluating whether that lack of knowledge was negligent?

4. *Causation.* The *Largey* court points out that to recover damages a plaintiff must do more than show the defendant's failure to make a required communication: The plaintiff must also show that he or she would have declined to undergo the procedure if the defendant had provided fuller information about its risks. How will using an objective standard for this part of the case "ease the fact-finding process"?

Statute: BURDEN OF PROOF FOR INFORMED CONSENT CLAIMS

Ark. Code §16-114-206 (2002)

(a) In any action for medical injury, the plaintiff shall have the burden of proving:

(1) The degree of skill and learning ordinarily possessed and used by members of the profession of the medical care provider in good standing, engaged in the same type of practice or specialty in the locality in which he practices or in a similar locality;

(2) That the medical care provider failed to act in accordance with that standard; and

(3) That as a proximate result thereof, the injured person suffered injuries which would not otherwise have occurred.

(b)(1) Without limiting the applicability of subsection (a) of this section, where the plaintiff claims that a medical care provider failed to supply adequate information to obtain the informed consent of the injured person, the plaintiff shall have the burden of proving that the treatment, procedure, or surgery was performed in other than an emergency situation and that the medical care provider did not supply that type of information regarding the treatment, procedure, or surgery as would customarily have been given to a patient in the position of the injured person or other persons authorized to give consent for such a patient by other medical care providers with similar training and experience at the time of the treatment, procedure, or surgery in the locality in which the medical care provider practices or in a similar locality.

(2) In determining whether the plaintiff has satisfied the requirements of subdivision (b)(1) of this section, the following matters shall also be considered as material issues:

(A) Whether a person of ordinary intelligence and awareness in a position similar to that of the injured person or persons giving consent

on his behalf could reasonably be expected to know of the risks or hazards inherent in such treatment, procedure, or surgery;

(B) Whether the injured party or the person giving consent on his behalf knew of the risks or hazards inherent in such treatment, procedure, or surgery;

(C) Whether the injured party would have undergone the treatment, procedure, or surgery regardless of the risk involved or whether he did not wish to be informed thereof;

(D) Whether it was reasonable for the medical care provider to limit disclosure of information because such disclosure could be expected to adversely and substantially affect the injured person's condition.

NOTES TO STATUTE

1. ***Description of Standard.*** Does this statute apply a professional standard of care to informed consent cases?

2. ***Problem: Silence for Patient's Own Good.*** Assume that a doctor believed that a particular medical procedure would benefit a patient and also believed that the patient would have rejected the procedure if the patient had known its risks. If the doctor performed the procedure without giving the patient information about the risks, should the doctor be treated as having failed to obtain informed consent under this statute?

Perspective: Informed Consent

Informed consent based on a reasonable patient rule requires a delicate balancing act between the patient's interest in autonomy and the physician's interest in expeditious treatment.

> [T]he law has forgotten about a physician's duty to get to know his or her patients as a prerequisite to adequate informed consent. Courts take for granted that this duty is met in the course of a medical history and exam. But in order to meet the goal of autonomous medical decision-making, informed consent law must extend the physician's duty to require that he or she makes a reasonable inquiry into the treatment goals of each patient. Only then can physicians adequately sort material from immaterial treatment information and present material information to patients in ways that truly enable patients to make choices that reflect their preferences.
>
> At the same time, the law must not interpret the duty of physician inquiry too broadly. As important as the principle of patient autonomy may be, it must be balanced against other competing interests, such as maintaining an efficient health care delivery system that does not unnecessarily spend valuable clinical time on learning a patient's every idiosyncrasy. In other words, while current law enforces a standard of inquiry that is too depersonalized, the law can also overcompensate by enforcing a standard that is so personalized as to be inefficient.

Robert Gatter, *Informed Consent Law and the Forgotten Duty of Physician Inquiry*, 31 Loy. U. Chi. L.J. 557, 559 (2000).

D. *Identifying the Defendant*

Identifying the proper defendant can be problematic for a plaintiff injured in the course of treatment by numerous medical professionals, especially if some of the professionals treat the plaintiff simultaneously. One pro-plaintiff approach to solving that problem was devised in the famous case Ybarra v. Spangard. The case also tests the boundaries of the *res ipsa loquitur* doctrine.

YBARRA v. SPANGARD

25 Cal. 2d 486, 154 P.2d 687 (1945)

GIBSON, C.J.

This is an action for damages for personal injuries alleged to have been inflicted on plaintiff by defendants during the course of a surgical operation. The trial court entered judgments of nonsuit as to all defendants and plaintiff appealed.

On October 28, 1939, plaintiff consulted defendant Dr. Tilley, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. Spangard at a hospital owned and managed by defendant Dr. Swift. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Drs. Tilley and Spangard and wheeled into the operating room by a nurse whom he believed to be defendant Gisler, an employee of Dr. Swift. Defendant Dr. Reser, the anesthetist, also an employee of Dr. Swift, adjusted plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. Reser then administered the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant Thompson, the special nurse, and another nurse who was not made a defendant.

Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder, but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. He complained to the nurse, and then to Dr. Tilley, who gave him diathermy treatments while he remained in the hospital. The pain did not cease but spread down to the lower part of his arm, and after his release from the hospital the condition grew worse. He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. He received further treatments from Dr. Tilley until March, 1940, and then returned to work, wearing his arm in a splint on the advice of Dr. Spangard.

Plaintiff also consulted Dr. Wilfred Sterling Clark, who had X-ray pictures taken which showed an area of diminished sensation below the shoulder and atrophy and wasting away of the muscles around the shoulder. In the opinion of Dr. Clark, plaintiff's condition was due to trauma or injury by pressure or strain applied between his right shoulder and neck.

Plaintiff was also examined by Dr. Fernando Garduno, who expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes, and not systemic. . . .

Plaintiff's theory is that the foregoing evidence presents a proper case for the application of the doctrine of *res ipsa loquitur*, and that the inference of negligence

arising therefrom makes the granting of a nonsuit improper. Defendants take the position that, assuming that plaintiff's condition was in fact the result of an injury, there is no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof. They attack plaintiff's action as an attempt to fix liability "en masse" on various defendants, some of whom were not responsible for the acts of others; and they further point to the failure to show which defendants had control of the instrumentalities that may have been involved. Their main defense may be briefly stated in two propositions: (1) that where there are several defendants, and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two or more persons, the rule of *res ipsa loquitur* cannot be invoked against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. We are satisfied, however, that these objections are not well taken in the circumstances of this case.

The doctrine of *res ipsa loquitur* has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, Torts, p.295. It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. . . .

There is, however, some uncertainty as to the extent to which *res ipsa loquitur* may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." 9 Wigmore, Evidence, 3d ed., §2509, p.382 . . . Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 231. In the last-named case, where an unconscious patient in a hospital received injuries from a fall, the court declared that without the doctrine the maxim that for every wrong there is a remedy would be rendered nugatory, "by denying one, patently entitled to damages, satisfaction merely because he is ignorant of facts peculiarly within the knowledge of the party who should, in all justice, pay them."

The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who

received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. . . . If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of *res ipsa loquitur* is properly applicable to the case before us.

The condition that the injury must not have been due to the plaintiff's voluntary action is of course fully satisfied under the evidence produced herein; and the same is true of the condition that the accident must be one which ordinarily does not occur unless some one was negligent. We have here no problem of negligence in treatment, but of distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation. The decisions in this state make it clear that such circumstances raise the inference of negligence and call upon the defendant to explain the unusual result. . . .

The argument of defendants is simply that plaintiff has not shown an injury caused by an instrumentality under a defendant's control, because he has not shown which of the several instrumentalities that he came in contact with while in the hospital caused the injury; and he has not shown that any one defendant or his servants had exclusive control over any particular instrumentality. Defendants assert that some of them were not the employees of other defendants, that some did not stand in any permanent relationship from which liability in tort would follow, and that in view of the nature of the injury, the number of defendants and the different functions performed by each, they could not all be liable for the wrong, if any.

We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. For example, in the present case it appears that Drs. Smith, Spangard and Tilley were physicians or surgeons commonly placed in the legal category of independent contractors; and Dr. Reser, the anesthetist, and defendant Thompson, the special nurse, were employees of Dr. Swift and not of the other doctors. But we do not believe that either the number or relationship of the defendants alone determines whether the doctrine of *res ipsa loquitur* applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

In this connection, it should be noted that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of *respondeat superior*. Thus a surgeon has been held liable for the negligence of an assisting nurse who leaves a sponge or other object inside a patient, and the fact that the duty of seeing that such mistakes do not occur is delegated to others does not absolve the doctor from responsibility for their negligence. . . .

It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of *res ipsa loquitur.* The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.

The other aspect of the case which defendants so strongly emphasize is that plaintiff has not identified the instrumentality any more than he has the particular guilty defendant. Here, again, there is a misconception which, if carried to the extreme for which defendants contend, would unreasonably limit the application of the *res ipsa loquitur* rule. It should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make.

An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. Thus, the test has become one of right of control rather than actual control. . . . In the bursting bottle cases where the bottler has delivered the instrumentality to a retailer and thus has given up actual control, he will nevertheless be subject to the doctrine where it is shown that no change in the condition of the bottle occurred after it left the bottler's possession, and it can accordingly be said that he was in constructive control. . . . Moreover, this court departed from the single instrumentality theory in the colliding vehicle cases, where two defendants were involved, each in control of a separate vehicle. . . . Finally, it has been suggested that the hospital cases may properly be considered exceptional, and that the doctrine of *res ipsa loquitur* "should apply with equal force in cases wherein medical and nursing staffs take the place of machinery and may, through carelessness or lack of skill, inflict, or permit the infliction of injury upon a patient who is thereafter in no position to say how he received his injuries." Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 231; see, also, Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425, 435, where the court refers to the "instrumentalities" as including "the unconscious body of the plaintiff."

In the face of these examples of liberalization of the tests for *res ipsa loquitur,* there can be no justification for the rejection of the doctrine in the instant case. As pointed out above, if we accept the contention of defendants herein, there will rarely be any compensation for patients injured while unconscious. A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. There may be, e.g., preparation for surgery by nurses and internes who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors; and post surgical care by the surgeon, a hospital physician, and nurses. The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of *res ipsa loquitur* is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

The judgment is reversed.

NOTES TO YBARRA v. SPANGARD

1. *Factual Setting.* The court refers to three elements of the *res ipsa loquitur* doctrine. Which defendants would most likely be successful in controverting the application of which elements? Were all the defendants likely to have had access to information about the conduct of each of them that might have caused the plaintiff's injury?

2. *Problem: Partial Information.* A surgeon, assisted by nurses, operated on the plaintiff's decedent,

> using a cauterizing machine, referred to as a "bovie." The bovie machine is a heat producing device used to make an incision in the patient's trachea. During the operation, a flame of fire approximately six inches in length emanated from the patient's throat which flame was extinguished by the nurse anesthetist and nurses.

See Schmidt v. Gibbs, 305 Ark. 383, 807 S.W.2d 928 (1991). The plaintiff sought damages from the surgeon and the nurses. Should the *res ipsa loquitur* doctrine apply if there is testimony at trial that the surgeon's conduct conformed to typical practice, but there is no testimony about the quality of work performed by the nurses?

Perspective: Using Res Ipsa *to Identify Defendants*

It seems to make sense for an unconscious plaintiff to be able to require the caretakers to prove that they were not individually responsible for the plaintiff's harm. Difficulties may follow from extending this rule to other situations. Imagine that a pedestrian was injured by someone's negligence driving in a large airport parking garage, but that the pedestrian had no memory of the incident. If the operator of the lot maintained records of the license plates of all cars that used the garage, would it be consistent with *Ybarra* to permit the pedestrian to seek damages from all the drivers whose cars had used the garage on the day of the injury? Is it desirable to extend the *Ybarra* rule to this context? If not, how is the medical situation different?

IV. Legal Malpractice and the Professional Standard

Attorneys are sometimes defendants in professional malpractice suits. Tort law evaluates their conduct with a professional standard of care. Russo v. Griffin, Jr. considers

whether to apply a locality, state, or national version of the standard. In Fishman v. Brooks, the court describes the unique "trial within a trial" that is sometimes used to determine what damages a plaintiff suffered because of a lawyer's malpractice.

RUSSO v. GRIFFIN

510 A.2d 436 (Vt. 1986)

HILL, J.

This is a legal malpractice action. The trial court found for defendants, H. Vaughn Griffin, Jr. and Griffin & Griffin, Ltd., and entered judgment on their behalf. Plaintiff, J.A. Russo Paving, Inc., appealed. We reverse.

Sometime during the 1930's Joseph Russo established a paving business in Rutland, Vermont. In 1975, Mr. Russo decided to turn the business over to his two sons, Anthony (Tony) and Francis (Frank). They approached defendant Griffin, a lawyer in the Rutland area, to help them with the process of incorporation. As their attorney, defendant Griffin drew up the corporate charter, filed it with the Secretary of State and arranged the necessary transfer of assets. Between 1975 and 1978 the corporation held its annual meetings at Mr. Griffin's office.

In early 1978, Frank entertained thoughts of purchasing a laundromat in Rutland, and he entered into discussions with his brother concerning the sale of his interest in the corporation. The father, who was not happy with the proposed arrangements, eventually got involved in the negotiations, which culminated in a meeting at Mr. Griffin's office.

According to defendant Griffin, the main purpose of the meeting, and the documents he prepared pursuant thereto, was to protect Frank. In this regard, a $6,000 promissory note from the corporation to Frank Russo was personally guaranteed by Tony Russo and his wife, and it was secured by a chattel mortgage. In return, Frank resigned as president and transferred his stock to the corporation.

At no time during the meeting did defendant Griffin inform the corporation or Tony Russo, the sole remaining shareholder, of the desirability of obtaining a covenant not to compete or explain the implications thereof. Three months after the stock transfer, Frank went back into the paving business in Rutland in direct competition with the plaintiff corporation. A properly drafted noncompetition covenant would have prevented this from occurring.

At trial, plaintiff introduced two expert witnesses, both well-respected practicing attorneys from the Burlington area, who testified that defendant Griffin's failure to advise the corporation to exact a covenant not to compete deviated from the standard of care required of attorneys practicing in Vermont at that time. Defendants introduced two similarly qualified Rutland attorneys who testified that defendant Griffin's conduct comported with the standard of care then expected of Rutland attorneys.

The question for determination was clearly whether defendant Griffin's conduct violated the attorney standard of care as it existed at the time of the alleged breach. In answering this question, the trial court focused on the long-standing professional relationship between defendant Griffin and the Russo family and the fact that this was not an arms-length transaction. It did not, however, find these facts to be dispositive. The court ultimately chose to accept the testimony of defendants', rather than plaintiff's, expert witnesses on the premise that "those attorneys whose practice