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\$325,000 Malpractice Award Affirmed 3-1

Res Ipsa Loquitur Theory Properly Applied

BY CERISSE ANDERSON

A \$325,000 jury verdict for pain and suffering awarded to a man in whom the tip of a catheter had broken off and lodged in his chest during an unsuccessful attempt to insert an intravenous line at a Brooklyn hospital has been upheld on appeal.

The decision will be published Monday.

The trial judge, Justice Jules L. Spodek in Brooklyn, had properly charged the jury to consider the doctrine of *res ipsa loquitur*, the majority of the Appellate Division, Second De-

partment, concluded Tuesday in its 3-1 affirmance of *Hawkins v. Brooklyn-Caledonian Hospital*.

Justice William D. Friedmann dissented and said he would have dismissed the complaint because he believed that Wayne Hawkins, who had a 19-year history of intravenous drug use, had failed to prove negligence on the part of the defendant hospital or resident who attempted to insert the catheter.

Mr. Hawkins appeared in the emergency room at the hospital on June 30, 1987, suffering from a collapsed lung due to an asthma attack. Since the blood vessels of Mr. Hawkins' arms and hands were not useable for insertion of intravenous lines to administer medications, Dr. James Szalados attempted to insert a catheter into a vein under his collar bone. The insertion was unsuccessful and when the catheter was removed, the tip had broken off and remained in Mr. Hawkins' chest.

Citing a recent Court of Appeals' decision on the application of the doctrine of *res ipsa loquitur*, the Latin phrase for a situation which implies negligence whether or not the negligent act is proven, the appellate panel's majority found that the evidence submitted by Mr. Hawkins was sufficient to support both a *prima facie*

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Malpractice Verdict Affirmed

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case of negligence and a charge to the jury on *res ipsa loquitur*.

"A plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is enough that the evidence . . . afford a rational basis for concluding that 'it was more likely than not' that the injury was caused by defendant's negligence," the court quoted from *Kambat v. St. Francis Hospital*, decided Feb. 13, 1997.

The defendants argued that there were issues of fact as to whether the plaintiff was contributorily negligent (by moving during the insertion of the catheter) or whether Dr. Szalados was in exclusive control of the instrumentality that caused the injury. Thus the doctrine of *res ipsa loquitur* should not have been applied.

"[T]he mere fact that the plaintiff was conscious and may have moved during the insertion procedure would not have compelled a conclusion, as a matter of law, that a rational jury could not conclude that the defendant was in exclusive control of the instrumentality of the injury," the majority said.

There was also sufficient evidence to support the jury's verdict that Dr. Szalados' failure to obtain assistance

during the insertion was a departure from accepted medical practice, the panel added.

The damages awarded — \$150,000 for past pain and suffering and \$175,000 for future pain and suffering — were not excessive, the majority said.

Justice Friedmann said he believed that the discrepancies in the evidence "regarding the central issue in the case, namely whether Dr. Szalados properly exercised his professional judgment under the circumstances, should have been submitted to the jury with conventional instructions on negligence and the credibility of witnesses. Instead the court's misguided *res ipsa loquitur* charge reinforced [the testimony of plaintiff's expert witness that an] 'accident equals malpractice,' and essentially compelled the jury to find the appellant liable."

He would have allowed no damage award, finding that the catheter tip had been encased in scar tissue and had no adverse effect on Mr. Hawkins' quality of life.

Justices David S. Ritter, Vincent Pizzuto and Daniel F. Luciano formed the majority on the panel.

Sanford F. Young of Young and Young was of counsel to Edelman & Goldstein for Mr. Hawkins on the appeal. Kenneth Mauro of Bower, Sanger & Futterman represented the defendants.