



Summer 1995

Tort Law - Supreme Court Opens the Door for Res Ipsa Loquitur in Medical Malpractice: Mireles v. Broderick

Tracy L. Rabern

Recommended Citation

Tracy L. Rabern, *Tort Law - Supreme Court Opens the Door for Res Ipsa Loquitur in Medical Malpractice: Mireles v. Broderick*, 25 N.M. L. Rev. 341 (1995).

Available at: <https://digitalrepository.unm.edu/nmlr/vol25/iss2/14>

TORT LAW—Supreme Court Opens the Door for Res Ipsa Loquitur in Medical Malpractice: *Mireles v. Broderick*

I. INTRODUCTION

In *Mireles v. Broderick*,¹ the New Mexico Supreme Court held that medical malpractice plaintiffs can base their case on a theory of res ipsa loquitur.² Prior to *Mireles*, New Mexico courts required that plaintiffs provide direct and detailed expert testimony of breach and causation in medical malpractice actions.³ A plaintiff that provided detailed expert evidence, however, risked losing the procedural benefit of a res ipsa loquitur theory.⁴ After *Mireles*, a malpractice plaintiff is entitled to submit her theory to the jury whenever she provides expert testimony supporting a reasonable inference of negligence.⁵ This note summarizes the history of res ipsa loquitur in New Mexico medical malpractice law, analyzes the *Mireles* decision, and explores the effect of this decision on malpractice litigation in New Mexico.

II. STATEMENT OF THE CASE

In 1985, Plaintiff Mary Ann Mireles underwent a bilateral mastectomy at Presbyterian Hospital.⁶ Defendant Dr. Thomas Broderick was the anesthesiologist for Mireles' operation.⁷ Shortly after surgery, Mireles developed ulnar neuropathy.⁸ Mireles' suit against Dr. Broderick⁹ went to a jury trial on theories of both negligence and res ipsa loquitur.¹⁰ The trial judge dismissed the res ipsa loquitur claim and refused to give

1. 117 N.M. 445, 872 P.2d 863 (1994). Justice Ransom wrote for a unanimous court.

2. *Id.* at 448, 872, P.2d at 866. Res ipsa loquitur, "the thing speaks for itself," is the principle that in some situations negligence can be inferred from the attendant circumstances. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 39, at 243 (5th ed. 1984).

To make a prima facie case on a res ipsa loquitur theory in New Mexico, the plaintiff must show: (1) that the injury was proximately caused by an instrumentality under the exclusive control of the defendant, and (2) that the injury-causing event was one that does not ordinarily occur absent negligence. *Martinez v. Teague*, 96 N.M. 446, 449, 631 P.2d 1314, 1317 (Ct. App. 1981); N.M. UNIF. JURY INSTRUCTION CIV. 13-1623 (Repl. Pamp. 1991).

3. See discussion *infra* part III.B.

4. See discussion *infra* part III.A.

5. See *Mireles*, 117 N.M. at 449 n.1, 872 P.2d at 867 n.1.

6. *Id.* at 447, 872 P.2d 865; Rex Graham, *N.M. Patients Win Round*, ALBUQUERQUE J., June 27, 1994, at A1, A5.

7. *Mireles*, 117 N.M. at 447, 872 P.2d at 865.

8. *Id.* Ulnar neuropathy is degenerative nerve damage, in this case affecting the fourth and fifth fingers of Mireles' right hand. *Id.*

9. *Id.* Mireles sued the anesthesiologist, not the surgeon, on the theory that the injuries she suffered were within the scope of anesthesiologist's duty. See *id.* According to Mireles' expert, because the anesthesiologist is the doctor who makes the patient unconscious, it is his duty to cushion and position the patient's arm during surgery to avoid degenerative nerve damage. See *id.*

10. *Id.*

the proposed *res ipsa loquitur* jury instruction.¹¹ The jury returned a verdict for Dr. Broderick on the theory of ordinary negligence,¹² and Mireles appealed the court's refusal to instruct on *res ipsa loquitur*.¹³

The court of appeals affirmed the trial court's holding on different grounds.¹⁴ The supreme court reversed the court of appeals and remanded.¹⁵

III. MEDICAL MALPRACTICE LAW AND RES IPSA LOQUITUR IN NEW MEXICO BEFORE *MIRELES*

Prior to *Mireles*, New Mexico medical malpractice case law conflicted so fundamentally with *res ipsa loquitur* case law that it seemed that a *res ipsa loquitur* theory could never support a medical malpractice claim.¹⁶ In medical malpractice cases, courts demand that plaintiffs meet rigorous evidentiary requirements.¹⁷ Courts use the tort doctrine of *res ipsa loquitur*, in contrast, to offer plaintiffs a procedural bypass to direct proof of negligence.¹⁸ In fact, courts in some traditional *res ipsa loquitur* decisions have penalized plaintiffs for proving too much,¹⁹ while courts in medical malpractice cases always dismiss plaintiffs who prove too little.²⁰ The logical result of this conflict was the court of appeals decision in *Mireles*,²¹ which effectively precluded the use of *res ipsa loquitur* to support a medical malpractice claim.²²

11. *Id.* In refusing to give the proposed *res ipsa loquitur* jury instruction, the court held that Mireles had failed as a matter of law to establish the factual predicate of exclusive control. *Id.* The trial court based this decision on Broderick's evidence that any one of the two doctors and three nurses in the operating room could have leaned on Mireles' arm, proximately causing the injury. See Graham, *supra* note 6, at A5.

12. *Mireles*, 117 N.M. at 445, 872 P.2d at 863.

13. *Id.* at 447, 872 P.2d at 865.

14. *Mireles v. Broderick*, 113 N.M. 459, 461, 827 P.2d 847, 849 (Ct. App. 1992). The appeals majority held that the Mireles's *res ipsa* jury instruction was improper and unnecessary as written. *Mireles*, 117 N.M. at 447, 872 P.2d at 865. See discussion *infra* part III.C.

Although the holding of the court of appeals was based on the language of Mireles' jury instruction, the analysis of the court effectively precluded medical malpractice plaintiffs from using a *res ipsa loquitur* theory. See discussion *infra* part III.C. The court of appeals decision was the law in New Mexico for over two years, and had a significant effect on malpractice litigation involving anesthetized patients. See generally Graham, *supra* note 4, at A5. For a discussion of that decision, see Alan H. König, Note, *Res Ipsa Loquitur in Medical Malpractice Actions: Mireles v. Broderick*, 23 N.M. L. REV. 411 (1993).

15. *Id.*

16. See, e.g., *Mireles v. Broderick*, 113 N.M. 459, 465, 827 P.2d 847, 853 (Ct. App. 1992) ("[S]till open in New Mexico is the question of when, if ever, *res ipsa* is applicable in a medical malpractice case.").

17. See discussion *infra* part III.B.

18. See discussion *infra* part III.A.

19. See discussion *infra* part III.A. "Proving too much" in a *res ipsa loquitur* case means either using experts, see *Hepp v. Quicquel Auto & Supply Co.*, 37 N.M. 525, 528 25 P.2d 197, 200 (1933), or supporting the elements of negligence sufficiently to reach the jury on an ordinary negligence theory, see *Tipton v. Texaco*, 103 N.M. 689, 698, 712 P.2d 1351, 1360 (1985).

20. See discussion *infra* part III.B. "Proving too little" means failing to support the elements of medical negligence with sufficient expert evidence to survive summary judgment. See, e.g., *Cervantes v. Forbis*, 73 N.M. 445, 449, 389 P.2d 210, 213 (1964).

21. 113 N.M. 459, 827 P.2d 847 (Ct. App. 1992).

22. See *infra* part III.C.

A. *Res Ipsa Loquitur* Case Required Inference from Indirect Evidence

The doctrine of *res ipsa loquitur* allows plaintiffs without direct evidence of the elements of negligence to get their case to the jury based on an *inference* of negligence.²³ Instead of directly proving the elements of ordinary negligence, the plaintiff provides evidence of facts and circumstances surrounding her injury that makes the inference of the defendant's negligence reasonable.²⁴ This theory relieves the plaintiff of having to directly prove breach and causation.²⁵

A plaintiff risked losing the procedural benefit of *res ipsa loquitur*, however, if she proved too much.²⁶ The doctrine of *res ipsa loquitur* in New Mexico was traditionally dependent on the scope of the common knowledge of lay-people.²⁷ Courts reasoned that in some situations, the common sense of jury members was sufficient to infer the defendant's negligence from the surrounding circumstances.²⁸ The "common knowledge" of all people justified imposing liability without direct proof.²⁹

Traditional *res ipsa loquitur* analysis in New Mexico began with *Hepp v. Quickel Auto & Supply Co.*,³⁰ in which the supreme court held that a plaintiff in a wrongful death action was not entitled to a jury trial on the theory of *res ipsa loquitur* because she relied on expert testimony and presented a reasonable ordinary negligence case.³¹ *Res ipsa loquitur*

23. See *Mireles*, 117 N.M. at 448, 872 P.2d at 866.

24. See *id.* The issue in a *res ipsa loquitur* case is whether there is a factual predicate sufficient to support an inference that the injury was caused by the failure of the party in control to exercise due care. *Id.*

If the plaintiff's evidence meets the elements of *res ipsa loquitur*, the court will permit the jury to infer the defendant's negligence without direct evidence of specific negligent events. See *Mireles*, 117 N.M. at 450, 872 P.2d at 868. Prior to *Mireles*, trial judges in malpractice cases decided as a matter of law whether the plaintiff had satisfied the elements. After *Mireles*, the trial judge only determines whether a reasonable jury could find the elements; if so, the theory is submitted to the jury for determination. See discussion *infra* part IV.B.

25. See *Tapia v. McKenzie*, 83 N.M. 116, 125, 498 P.2d 181, 190 (Sutin, J., specially concurring). "The doctrine of *res ipsa loquitur* is a rule of common sense and common sense permits an inference from proof of the injury and the physical agency inflicting it, without requiring proof of facts pointing to the responsible human cause." *Id.* (citing *Witort v. United States Rubber Co.*, 223 A.2d 323 (Conn. 1966)).

26. See, e.g., *Hepp v. Quickel Auto & Supply Co.*, 37 N.M. 525, 528, 25 P.2d 197, 200 (1933). "[W]here facts and circumstances surrounding the injury themselves point with sufficient definiteness to warrant an inference [of negligence], then the reason for the application of the rule fails." *Id.*

27. See, e.g., *Mireles*, 117 N.M. at 447, 872 P.2d at 865. The Defendant argued in *Mireles* was that *res ipsa loquitur* is limited by the scope of the jury's common knowledge. *Id.*

28. See *Hepp v. Quickel*, 37 N.M. at 529, 25 P.2d at 199 (inference of negligence rests on common experience and not the specific circumstances of the case).

29. See, e.g., *id.* at 529, 25 P.2d at 200.

30. 37 N.M. 525, 25 P.2d 197 (1933). Hepp's husband was killed in car accident when the brake malfunctioned after the defendant's repair. *Id.* at 527, 25 P.2d at 199. Hepp presented two experts who testified that the brake would not have locked if the repair had been done properly, although neither could say authoritatively exactly what caused the failure. *Id.* at 530-31, 25 P.2d at 201-02. Quickel appealed jury verdict for Hepp, and Hepp argued that she had presented a prima facie case under *res ipsa loquitur*. *Id.* at 527, 25 P.2d at 199.

31. See *id.* at 533, 25 P.2d at 202. The court nonetheless upheld a jury verdict for the plaintiff, holding that the inference of negligence from expert testimony was "permissible" under the rules of circumstantial evidence. *Id.* The court deliberately distinguished this inference, however, from

was not necessary in *Hepp* because the plaintiff provided "sufficiently suggestive" evidence of negligence.³² *Res ipsa loquitur*, in contrast, was reserved for those cases in which "there was no evidence, circumstantial or otherwise" indicating negligence but for the "teaching of common experience."³³ Under this reasoning, a plaintiff can prove herself out of a *res ipsa loquitur* case by either offering expert testimony, or adequately proving the elements of ordinary negligence.³⁴ As discussed below, the court of appeals applied an analysis similar to *Hepp* in *Mireles*.³⁵

B. Medical Malpractice Case Requires Expert Testimony and Direct Evidence of Negligence

In contrast to *res ipsa loquitur* case law, medical malpractice case law demands that a plaintiff meet rigorous evidentiary standards in order to reach the jury in New Mexico.³⁶ Medical malpractice law requires that a plaintiff prove the defendant's professional negligence with expert testimony.³⁷ The expert requirement is subject to only a very narrow "common knowledge" exception,³⁸ which applies only in cases in which the negligent act involves no medical skill or judgment,³⁹ or in which the event is very simple and the cause is undisputed.⁴⁰

the inference under *res ipsa loquitur*. *Id.* ("[W]e do not invoke the distinctive rule of *res ipsa loquitur*"). The inference in *Hepp* was permissible based on the plaintiff's evidence, including expert testimony. *See id.*

32. *Id.*

33. *Id.* at 529, 25 P.2d at 201. The cases following *Hepp* have not uniformly followed its analysis. *See, e.g.,* *Tuso v. Markey*, 61 N.M. 77, 82, 294 P.2d 1102, 1107 (1956) (stating that equating the inference permitted as ordinary negligence in *Hepp* with a *res ipsa loquitur* inference). Many cases have ignored the *Hepp* court's distinction between a permissible inference from expert testimony and a *res ipsa loquitur* inference. *See, e.g.,* *Strong v. Shaw*, 96 N.M. 281, 286, 629 P.2d 784, 788 (Ct. App. 1980) (stating that *res ipsa loquitur* requires facts that lead to a reasonable and logical inference that the defendant was negligent); *Harless v. Ewing*, 81 N.M. 541, 545, 469 P.2d 520, 524 (Ct. App. 1970) (stating that the fact that plaintiff introduced evidence of specific negligent conduct does not preclude *res ipsa* case).

At least one non-malpractice case has allowed a *res ipsa loquitur* inference to be based on evidence of specific negligent acts. *See Strong*, 96 N.M. at 283, 629 P.2d at 786.

34. *See Tipton v. Texaco*, 103 N.M. 689, 698, 712 P.2d 1351, 1360 (1985) (stating that *res ipsa* was an "unnecessary crutch" because the issue went to jury under ordinary negligence theory and therefore *res ipsa* was not the plaintiff's only recourse).

Dr. Broderick advanced both arguments in *Mireles v. Broderick*, 117 N.M. 445, 447, 872 P.2d 863, 865.

35. *See* discussion *infra* part III.C.

36. *See generally*, *Cervantes v. Forbis*, 73 N.M. 445, 448, 389 P.2d 210, 213 (1964) (expert testimony required as to both breach of duty and causation); *Buchanan v. Downing*, 74 N.M. 423, 425, 394 P.2d 269, 271 (1964) (expert testimony that negligence was possible was insufficient).

37. N.M. UNIF. JURY INSTRUCTION CIV. 13-1101 (Repl. Pamp. 1991). ("The only way in which you may decide whether the defendant possessed and applied the knowledge and used the skill and care which the law required of [him] [her] is from evidence presented in the trial by doctors testifying as expert witnesses."); *see also* *Schmidt v. St. Joseph's Hosp.*, 105 N.M. 681, 684, 736 P.2d 135, 138 (Ct. App. 1987).

38. *See* N.M. UNIF. JURY INSTRUCTION CIV. 13-1101 (Duty of doctor).

39. *See, e.g.,* *Pharmaseal Lab., Inc. v. Goffe*, 90 N.M. 753, 758, 568 P.2d 589, 594 (1977) (holding that expert testimony is not mandatory when a particular element of negligence concerns simple, mechanical and non-technical acts that can be understood by lay people without the assistance of experts).

40. *See, e.g.,* *Mascareñas v. Gonzales*, 83 N.M. 749, 752, 497 P.2d 751, 754 (1972) ("A manipulation of the spine which results in four fractured ribs is not a condition peculiarly within the knowledge of medical men [sic]").

Courts will generally dismiss medical malpractice cases not supported by expert testimony as a matter of law.⁴¹ In *Cervantes v. Forbis*,⁴² the supreme court held as a matter of law that there can be no issues of fact when the plaintiff failed to offer expert testimony.⁴³ Likewise in *Buchanan v. Downing*,⁴⁴ the supreme court held as a matter of law that plaintiff must make a "minimum showing" by expert testimony as to both breach and cause to raise an issue of fact in a medical injection case.⁴⁵ Although both the *Cervantes* and *Buchanan* plaintiffs argued that they were entitled to reach the jury on a theory of *res ipsa loquitur*, neither decision directly addressed these theories.⁴⁶

In *Smith v. Klebanoff*,⁴⁷ the New Mexico Court of Appeals required that the plaintiff must not only provide an expert, but also that the expert must explain precisely how the defendant breached the standard of care.⁴⁸ The plaintiff produced an expert's affidavit stating that the undisputed act⁴⁹ causing the injury amounted to a breach of the standard of care.⁵⁰ The court found as a matter of law that the expert did not sufficiently explain *how* the defendants' conduct fell below the standard of care.⁵¹ Therefore, the court concluded that because the expert had

41. See, e.g., *Woods v. Brumlop*, 71 N.M. 221, 229, 377 P.2d 520, 528 (1962) (reasoning "that the cause and effect of a physical condition lies in a field of knowledge in which only a medical expert can give a competent opinion . . . [Without experts] we feel that the jury could have no basis other than conjecture, surmise, or speculation upon which to consider" causation.).

42. 73 N.M. 445, 389 P.2d 210 (1964). The plaintiff brought suit for injury to his knee during surgery to repair a broken femur. *Id.* at 446-47, 389 P.2d at 211-12.

43. *Id.* at 448, 389 P.2d at 213. The plaintiff argued that the defendant's record of the events during surgery gave rise to a reasonable inference of negligence in the common experience of laypeople. See *id.* The court granted the defendants summary judgment based solely on the defendants' own depositions. *Id.* at 446, 389 P.2d at 211.

44. 74 N.M. 423, 394 P.2d 269 (1964). The plaintiff suffered an adverse reaction and required a skin graft at the site of an injection by defendant. *Id.* at 424, 394 P.2d at 270.

45. *Id.* at 427, 394 P.2d at 273. The plaintiff offered no expert evidence but relied on a statement in defendant doctor's deposition to raise an inference of negligence. See *id.* at 425, 394 P.2d at 271. The supreme court reasoned that the because "[m]any things can go wrong" with injections, the explanation "must be left to those who are schooled and trained in that science." *Id.* at 427, 394 P.2d at 273.

46. In each case the court held as a matter of law that the common knowledge exception did not apply, and dismissed the plaintiffs' claims for failure to provide expert testimony as to the ordinary negligence elements of breach and causation. See *Cervantes*, 73 N.M. at 448-49, 389 P.2d at 213-14; *Buchanan*, 74 N.M. at 427, 394 P.2d at 273. The court in neither case indicated whether expert testimony that supported the inference of breach of duty or of causation would be sufficient to raise issues of fact. See *infra* Part IV.

47. 84 N.M. 50, 499 P.2d 368 (Ct. App.), cert. denied 83 N.M. 37, 499 P.2d 355 (1972). The plaintiff underwent surgery for removal of a herniated disc and suffered injury to the arteries in her neck. *Id.* at 52, 499 P.2d at 370. The defendants were granted summary judgment on the basis of evidence indicating that the injury was an inherent danger of the surgical procedure, and that this injury occurs in a small but statistically determinable number of cases even when the surgeon is careful. See *id.* at 53, 736 P.2d at 371.

48. See *id.*

49. It was not disputed that during the procedure the neurosurgeon penetrated Smith's right iliac artery and almost severed the right iliac vein. *Id.* at 52, 499 P.2d at 370.

50. See *id.* at 57, 499 P.2d at 375. The affidavit of out-of-state expert Dr. Davis stated, "[T]his act in the performance of the surgical operation constituted . . . less than the usual caution and care . . . of medical practice under the circumstances." *Id.*

51. *Id.* at 53, 499 P.2d at 371.

failed to provide an adequate foundation for his opinion,⁵² the opinion was incompetent.⁵³ Consequently, without the benefit of expert testimony, the plaintiff failed to raise an issue of fact.⁵⁴ In *Schmidt v. St. Joseph's Hospital*,⁵⁵ the court of appeals indicated in dicta that the plaintiff must provide expert testimony as to precisely how the injury occurred or exactly how the defendant breached in order to raise an issue of fact.⁵⁶ The appeals court required direct proof from the plaintiffs in both of these cases despite the fact that both plaintiffs were anesthetized when injured.⁵⁷

C. *Mireles: Court of Appeals Finds Res Ipsa Loquitur and Medical Malpractice Law Irreconcilable*

The court of appeals decision in *Mireles* was the natural result of the conflict between res ipsa loquitur case law and medical malpractice. The court attempted to avoid choosing between the conflicting evidentiary requirements of medical malpractice law and res ipsa loquitur⁵⁸ by basing its decision on the language of the jury instruction tendered by Plaintiff.⁵⁹

52. *Id.*

53. *Id.*; but see *id.* at 56-58, 736 P.2d at 374-376 (Hendley, J., dissenting) (contending that the factual issue had been raised by the expert affidavit together with supporting documents describing "safer guidelines" for avoiding this type of injury).

54. *Id.* at 53, 499 P.2d at 371. The appeals court began its analysis from the proposition that an unfortunate result (injury) does not raise an issue of fact. *Id.* Citing *Cervantes*, the court reasoned that plaintiff must either 1) show "exceptional circumstances" or 2) show that the injury was caused by defendant's failure to employ due care. *Id.* The court found no mention of "exceptional circumstances" in plaintiff's expert affidavit, but did not indicate what "exceptional circumstances" might be. See *id.*

55. 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987). This malpractice action involved substantially similar facts and the same defendant as *Mireles*, Dr. Broderick. Note, however, that plaintiff Schmidt was deemed to have admitted propositions that were fatal to his res ipsa claim because he had failed to respond to requests for admissions. See *id.* at 684, 736 P.2d at 138.

56. *Id.* at 684, 736 P.2d at 138. To illustrate the kind of evidence required to raise a factual issue, the *Schmidt* court referred to two factually similar North Carolina cases that reached opposite results. Compare *Hoover v. Gaston Memorial Hosp., Inc.*, 180 S.E.2d 479, 482 (Ct. App. N.C. 1971) (summary judgment in ulnar neuropathy case proper because plaintiff unable to obtain evidence as to how and when injury occurred) with *Parks v. Perry*, 314 S.E.2d 287, 290 (Ct. App. N.C. 1984) (summary judgment improper because plaintiffs provided expert witnesses tending to show that injury occurred due to mispositioning of arm).

57. Compare generally David W. Louisell & Harold Williams, *Res Ipsa Loquitur—Its Future in Medical Malpractice Cases*, 48 CAL. L. REV. 252, *passim* (1960) (arguing that in case of an injured anesthetized patient, res ipsa loquitur is the expression of a moral duty owed patient to disclose); E. Wayne Thode, *The Unconscious Patient: Who Should Bear the Risk of Unexplained Injuries to a Healthy Part of His Body?*, 1 UTAH L. REV. 1, *passim* (1969) (arguing that res ipsa loquitur in the context of an anesthetized patient is a function of defendant's duty to protect the plaintiff).

58. *Mireles v. Broderick*, 113 N.M. 459, 466, 827 P.2d 847, 854 (Ct. App. 1992) (Bivins, J., concurring) (The court assumed, without deciding, that expert testimony could support a res ipsa theory but expressed doubt that res ipsa loquitur could ever apply in a medical malpractice context).

59. *Id.* at 460, 827 P.2d 848. The Uniform Jury Instruction for res ipsa loquitur contains a blank to be filled in with the "name of the instrumentality or occurrence" causing injury. N.M. UNIF. JURY INSTRUCTION CIV. 13-16230 (Repl. Pamp. 1991). The trial court tendered the instruction describing the injury-causing occurrence as "inadequate protection of plaintiff's extremities during anesthesia." *Mireles*, 117 N.M. at 447, 872 P.2d at 865. The court of appeals found that this language instructed the jury to find the fact of negligence (ordinary negligence theory) rather than the premise of exclusive control (res ipsa loquitur theory). *Mireles v. Broderick*, 113 N.M. 459, 465, 827 P.2d 847, 853 (Ct. App. 1992). Because *Mireles'* instruction did not serve the sole purpose of a res ipsa instruction, it therefore was an "unnecessary crutch" and the appeals court was justified in refusing it. *Id.*

Judge Hartz, however, scrutinized the plaintiff's jury instruction under an analysis similar to that employed in *Hepp*,⁶⁰ and in effect concluded that Mireles had proven herself out of her *res ipsa* case.⁶¹

Like the court in *Hepp*, the appeals court distinguished inferences based on expert testimony⁶² from *res ipsa loquitur* inferences.⁶³ The court determined that the *res ipsa* instruction was unnecessary for the jury to find causation because Mireles' causal theory had already gone to the jury under the ordinary negligence instruction.⁶⁴ The instruction was unnecessary for the jury to find breach of duty because, as Judge Hartz noted, the evidence came directly from the testimony of Plaintiff's expert, and involved no inference.⁶⁵ The effect of the court of appeals decision was to exclude *res ipsa loquitur* from medical malpractice litigation.

IV. MIRELES' HOLDING, ANALYSIS AND IMPLICATIONS

A. Supreme Court Holding

In *Mireles*, the supreme court rejected the court of appeals analysis and gave plaintiffs two options to choose from: to build a case on detailed expert testimony, and to reach the jury on a *res ipsa loquitur* theory.⁶⁶ The court found that *res ipsa loquitur* is not limited by the scope of common knowledge,⁶⁷ and adopted the Restatement position, which provides that: "[E]xpert testimony that such an event usually does not occur without negligence may be essential to the plaintiff's case, where, as for example in some actions for medical malpractice, there is no fund of common knowledge which may permit laymen [sic] reasonably

60. *Hepp v. Quickel Auto & Supply Co.*, 37 N.M. 525, 25 P.2d 197 (1933).

61. In order to justify refusing to instruct on Plaintiff's theory altogether when "perhaps a true *res ipsa* instruction would have been appropriate," the court of appeals found the instruction as tendered unnecessary. *Mireles v. Broderick*, 113 N.M. 459, 465, 827 P.2d 847, 853 (Ct. App. 1992) (citing *Kirk Co. v. Ashcraft*, 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984)).

62. *See id.* at 462-63, 827 P.2d at 850-51 (the principles of circumstantial evidence already allow the jury to make reasonable inferences from circumstantial evidence).

63. *Id.* at 462, 827 P.2d at 850 ([R]es ipsa . . . "permits an inference that under customary standards would be considered too speculative to support a verdict."). The court reasoned that *res ipsa loquitur* is only appropriate when the court finds it necessary to inform the jury that the jury is permitted to make an otherwise improperly speculative inference of negligence. *Compare with Hepp*, 37 N.M. at 533, 25 P.2d at 207 (distinguishing *res ipsa loquitur* inference from one based on "sufficiently suggestive" evidence). *Id.* (purpose of *res ipsa loquitur* to "spell out the desired chain of inference").

64. *Mireles v. Broderick*, 113 N.M. 459, 465, 827 P.2d 847, 853 (Ct. App. 1992) ("It is not error to deny requested instructions when the instructions [already to be] given adequately cover the law to be applied.") (citing *Kirk Co. v. Ashcraft*, 101 N.M. 462, 466, 684 P.2d 1127, 1131 (1984)).

65. *Id.* at 464, 827 P.2d at 852. (jury finding of failure to follow protective procedures described by expert is not based on *res ipsa loquitur* inference, but is based directly on expert testimony that such an omission constitutes negligence). *But see Hepp v. Quickel Auto & Supply Co.*, 37 N.M. 525, 529, 25 P.2d 197, 201 (1933) (*res ipsa* reserved for those cases where there is no evidence, circumstantial or otherwise, of negligence).

66. *Mireles v. Broderick*, 117 N.M. 445, 452, 872 P.2d 863, 870 (1994).

67. *Mireles*, 117 N.M. at 448, 872 P.2d at 866 (noting that the common knowledge exception to the expert testimony rule may inform but does not delimit the application of *res ipsa loquitur*).

to draw the conclusion."⁶⁸ The court therefore permitted Mireles to base her *res ipsa loquitur* case on the testimony of her expert, Dr. Randall Waring.⁶⁹

The court held that the trial judge is under a duty to instruct on *res ipsa loquitur* whenever the plaintiff has produced evidence supporting the reasonable inference of negligence.⁷⁰ Mireles was entitled to the instruction because Waring's testimony supported each of the elements of *res ipsa loquitur*.⁷¹

Finally the court rejected Dr. Broderick's argument that Mireles could not, as a matter of law, satisfy the exclusive control element of *res ipsa loquitur*.⁷² The court found that the jury could reasonably find exclusive control from Dr. Waring's testimony that Dr. Broderick had the "*ultimate responsibility*" to protect the plaintiff from this type of injury.⁷³

B. Analysis and Implications

Justice Ransom's analysis in *Mireles* departs radically from prior law in four important ways. First, the court rejected the *res ipsa loquitur* analysis in *Hepp* and the court of appeals in *Mireles*. Second, *Mireles* allows plaintiffs to make a *prima facie* case on probabilities, not specific evidence. Third, *Mireles* shifts much of the power to determine whether *res ipsa loquitur* applies from the trial judge to the jury. Finally, *Mireles* greatly expands the element of exclusive control.

First, unlike *Hepp* and the court of appeals decision in *Mireles*, plaintiffs under *Mireles* do not risk losing their *res ipsa* case by proving too much.⁷⁴

68. RESTATEMENT (SECOND) OF TORTS § 328D cmt. d (1965), as quoted in *Mireles*, 117 N.M. at 448, 872 P.2d at 866. The court also cited, without analysis, cases from nine jurisdictions that have allowed expert testimony to support a *res ipsa* claim. *Mireles*, 117 N.M. at 448, 872 P.2d at 866. See, e.g., *Jones v. Harrisburg Polyclinic Hospital*, 437 A.2d 1134 (Pa. 1981) (allowing expert testimony to support both the element of exclusive control and the element of injury ordinarily does not occur absent negligence).

69. See *Mireles*, 117 N.M. at 448, 872 P.2d at 866. Dr. Waring was an out-of-state anesthesiologist. Graham, *supra* note 7, at A5.

70. *Mireles*, 117 N.M. at 448, 872 P.2d at 866.

71. See *id.* at 447, 872 P.2d at 865. Waring testified that he believed Mireles' injury, "in all probability, occurred while she was under anesthesia for [the] surgery." *Id.* Waring explained that the ulnar nerve can be injured during surgery by compression, and he described in detail the proper protective procedure for positioning, cushioning, and monitoring the arm during surgery. *Id.* According to Waring, the anesthesiologist ultimately holds responsibility for protecting against this type of injury. *Id.* Waring concluded that ulnar injury cannot occur during surgery unless the anesthesiologist fails in these procedures, and that such failure constitutes professional negligence. *Id.*

The court also held that Mireles was entitled to go to the jury, notwithstanding the conflicting evidence presented by the defendant. See *Mireles*, 117 N.M. at 451, 872 P.2d at 869 (court under duty to give instruction tendered with the words "inadequate protection" where conflicting evidence on available means to protect). Dr. Broderick offered evidence that he properly positioned and cushioned the arm, and that the injury possibly could have occurred after surgery. *Mireles v. Broderick*, 113 N.M. 459, 460, 827 P.2d 847, 848 (Ct. App. 1992). Broderick also stated that this type of injury can occur in the absence of negligence. *Id.*

72. *Mireles*, 117 N.M. at 452, 872 P.2d at 870.

73. *Id.*

74. The court stated that evidence of specific acts of negligence strengthens, not destroys, a plaintiff's *res ipsa* case. *Id.* at 449-50, 872 P.2d at 867-68 (quoting KEETON ET AL., *supra* note 2,

Plaintiffs are now able to provide as much expert and specific evidence as possible without risking their *res ipsa loquitur* theory.⁷⁵ This will result in more malpractice plaintiffs submitting their cases to the jury.⁷⁶

Second, *Mireles* marks a significant change in the type of evidence required to make a *prima facie* malpractice case. In both *Schmidt v. St. Joseph's Hospital*⁷⁷ and *Smith v. Klebanoff*,⁷⁸ the plaintiffs were required to establish exactly what transpired in the surgical suite while under anesthesia.⁷⁹ In *Mireles*, however, the plaintiff was allowed to go the jury on *indirect* evidence—on evidence indicating the probability⁸⁰ that her injury was the result of the defendant's negligence.⁸¹ New Mexico now allows plaintiffs, like *Mireles*, to get to the jury without proving specific events.⁸²

Plaintiffs will probably find it less difficult to obtain expert testimony on the probabilities of negligence than on specific negligent acts.⁸³ Justice Ransom noted in *Mireles* that "a fellow physician may be disposed to speak to the necessary predicate but ill-disposed to state the natural inference that follows."⁸⁴ The court also noted that *Mireles* was actually "unable" to provide direct expert testimony that Broderick's negligent conduct caused her injury.⁸⁵

Third, the *Mireles* decision shifts the power to determine whether *res ipsa* applies from the trial judge to the jury. In malpractice cases like *Cervantes* and *Buchanan*, the judge ruled as a matter of law that plaintiffs had not met the elements of *res ipsa loquitur*.⁸⁶ Under *Mireles*, however,

§ 40, at 260) (evidence tending to show specific acts of negligence, short of a "full and complete explanation . . . does not deprive plaintiff of benefit of *res ipsa loquitur*.").

Compare *id.* with *Tipton v. Texaco*, 103 N.M. at 689, 698, 712 P.2d 1351, 1360 (1985) (*res ipsa* is an "unnecessary crutch" when case goes to jury on ordinary negligence theory).

75. See *id.* at 450, 872 P.2d at 868 (plaintiff will not lose *res ipsa* theory unless she furnished "full and complete explanation of the occurrence," in which case the doctrine is superfluous).

76. See Thomas A. Eaton, *Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment*, 17 GA. L. REV. 33, 55 (1982) ("The primary anticipated effect of expanding the availability of *res ipsa loquitur* through the use of expert testimony is to enable more malpractice claims to reach the jury.").

77. 105 N.M. 681, 736 P.2d 135 (Ct. App. 1987).

78. 84 N.M. 50, 499 P.2d 368 (Ct. App. 1972).

79. See *Schmidt*, 105 N.M. at 683-84; *Smith*, 84 N.M. at 53.

80. See *Mireles*, 117 N.M. at 449 n.1, 872 P.2d at 867 n.1 (applicability of *res ipsa* depends on presence of evidence raising an inference that the accident more probably than not occurred as a result of breach).

81. See *id.* at 450, 872 P.2d at 868 (noting that *Mireles* was unable to provide direct evidence of the injury-causing events while she was under anesthesia).

82. See, e.g., *id.* at 450, 452, 872 P.2d at 868, 870 (*Mireles* unable to provide direct evidence of negligence, yet essential question is whether the probable cause was one within scope of defendant's duty).

See also Eaton, *supra* note 76, at 52. Eaton characterizes the difference between direct and indirect evidence as follows: "Specificity is the primary difference between this type of expert evidence and that traditionally presented in malpractice cases. Rather than testifying that a particular act or omission of the defendant was negligent, the expert would assess the probability that the injury was the product of negligence." *Id.*

83. See *Mireles*, 117 N.M. at 449 n.1, 872 P.2d at 867 n.1.

84. *Id.*

85. *Id.* at 450, 872 P.2d at 868.

86. See *Buchanan v. Downing*, 74 N.M. 423, 425, 394 P.2d 269, 271 (1964); *Cervantes v. Forbis*, 73 N.M. 445, 449, 389 P.2d 210, 213 (1964); see also *supra* part III.B.

the role of the trial judge will be limited to determining whether a reasonable jury could find the elements of *res ipsa loquitur*.⁸⁷ Where conflicting conclusions can be drawn from the plaintiff's and defendant's evidence, the trial judge should instruct on *res ipsa loquitur*.⁸⁸ Therefore, the jury will decide whether *res ipsa* applies by finding that the plaintiff has or has not proven the two *res ipsa* elements.⁸⁹

Finally, the *Mireles* court greatly expanded the element of exclusive control.⁹⁰ The court adopted the Restatement position that "[t]he essential question becomes one of whether the probable cause is one which the defendant was under a duty to the plaintiff to anticipate or guard against."⁹¹ As a result, the element of exclusive control potentially includes all events within the scope of the defendant's duty to the plaintiff.⁹² A plaintiff can meet the exclusive control element of *res ipsa loquitur* despite the fact that parties other than the defendant had access to the injury-causing instrument.⁹³

This expanded view of the exclusive control element, combined with the jury's expanded role in determining whether *res ipsa* applies, may subject a greater number of health care providers to liability.⁹⁴ The scope

87. *Mireles*, 117 N.M. at 451, 452, 872 P.2d at 869, 870 (because testimony by Dr. Waring supported the element of *res ipsa*, the question should go to the jury).

88. See *id.* at 452, 872 P.2d at 870. But see *Harless v. Ewing*, 81 N.M. at 541, 546, 469 P.2d at 520, 525 (Ct. App. 1970) (non-malpractice case held that when conflicting conclusions can be drawn from evidence, jury properly decides the issue of whether *res ipsa loquitur* applies).

The malpractice defendant is accordingly not entitled to summary judgment or directed verdict on the basis of the defendant's own testimony. Eaton, *supra* note 76, at 55.

89. See N.M. UNIF. JURY INSTRUCTION CIV. 13-1623 (Repl. Pamp. 1991); *Strong v. Shaw*, 96 N.M. 281, 283, 629 P.2d 784, 786 (Ct. App. 1980) ("The factfinder makes a determination, based on experience, whether the occurrence is one of the *res ipsa* type."); *Harless*, 81 N.M. at 546, 469 P.2d at 525 (stating that the trial court should not decide the issue of applicability of *res ipsa* as a matter of law, and issue should go to jury). If the jury finds the plaintiff has met the elements, the jury is permitted, but not required, to find for the plaintiff. N.M. UNIF. JURY INSTRUCTION CIV. 13-1623. Note that under this instruction, the jury that chooses to make the inference of negligence next must go back and reconsider whether the injury is consistent with due care. See *id.*

90. See *Mireles*, 117 N.M. at 452, 872 P.2d at 870. The court adopted the position Justice Ransom had taken in an earlier, non-malpractice *res ipsa loquitur* case. *Id.* (citing *Trujeque v. Service Merchandise Co.*, 117 N.M. 388, 391, 872 P.2d 361, 364 (1994)).

91. RESTATEMENT (SECOND) OF TORTS § 328(D) cmt. g, quoted in *Trujeque*, 117 N.M. at 391, 872 P.2d at 364.

92. See *Trujeque*, 117 N.M. at 393, 872 P.2d at 366. "All that the plaintiff should be required to do in the first instance is to show that the defendant . . . was responsible for the management . . . of [] the thing doing the damage." *Id.* (quoting *Chenall v. Palmer Brick Co.*, 43 S.E. 443, 445 (Ga. 1903)). In *Mireles*, Justice Ransom referred to the scope of the defendant's duty as "the ultimate responsibility" to protect. *Mireles*, 117 N.M. at 452, 872 P.2d at 870.

93. See *Trujeque*, 117 N.M. at 392, 872 P.2d at 365 ("The implication that access itself prevents application of *res ipsa loquitur* . . . was improper.')

94. In *Mireles* the plaintiff's theory was that the injury-causing instrumentality was the plaintiff's own body, which by its position under anesthesia compressed her ulnar nerve. *Mireles*, 117 N.M. at 447, 872 P.2d at 865; see also *Rex Graham, N.M. Patients Win Round*, ALBUQUERQUE J., June 27, 1994, at A1, A5. Plaintiff *Mireles* was able to place this cause within the scope of Defendant Broderick's duty through Waring's testimony that the duty of the anesthesiologist includes properly positioning, cushioning, and monitoring the arm. *Mireles*, 117 N.M. at 447, 872 P.2d at 865. Citing *Trujeque*, Justice Ransom held that this testimony was sufficient to submit the exclusive control element to the jury despite Defendant's evidence that any of several people in the surgical suite had access to *Mireles'* body. *Id.*

of the duty that a health care provider owes to an anesthetized patient is often far more extensive than the degree of physical control the provider exercises. The duty a hospital owes its patients is even more broad, and might arguably include several events by different agents which in concert cause an injury.⁹⁵ It may be possible under *Mireles* to find medical defendants *legally* responsible without being present in the surgical suite at all.

Despite the significant changes in the law outlined above, the *Mireles* opinion does not explicitly address the conflict between medical malpractice law and *res ipsa loquitur*. In fact, the court referred to *Hepp* in *support* of the proposition that New Mexico case law contains no historical limitation on *res ipsa loquitur* with respect to expert testimony.⁹⁶ *Hepp*, however, illustrates the opposite.⁹⁷ The *Hepp* court deliberately distinguished the plaintiff's inference of negligence from the presumption of negligence under the doctrine of *res ipsa loquitur*.⁹⁸

The *Mireles* court also did not resolve the competing policies underlying the evidentiary requirements of *res ipsa loquitur* and medical malpractice law. Courts sitting in medical malpractice cases require detailed expert testimony because a jury of lay-people generally lacks the knowledge to determine the factual issues of medical causation and breach of a medical standard of care.⁹⁹ In contrast, judges in *res ipsa loquitur* cases *rely* on the jury to fill in the missing pieces from the plaintiff's case with their common experience.¹⁰⁰ In medical malpractice cases, particularly those in which the plaintiff was anesthetized when injured, both of these policies are important.¹⁰¹

95. See Eaton, *supra* note 76, at 66-67.

96. See *Mireles*, 117 N.M. at 448, 872 P.2d at 866 (citing *Hepp v. Quickel Auto & Supply Co.*, 37 N.M. 525, 528, 25 P.2d 197, 199 (1933)).

97. The specific passage Justice Ransom refers to does state that *res ipsa* allows the jury to infer negligence from the fact of injury and the "surrounding circumstances." *Hepp*, 37 N.M. at 528, 25 P.2d at 200 (quoting *Plumb v. Richmond Light & R.R. Co.*, 135 N.E. 504, 505 (N.Y. 1922)). However, the passage quoted in *Hepp* goes on to explain that "surrounding circumstances" does *not* refer to circumstances that tend to indicate breach of duty. In this passage "surrounding circumstances" are "neutral circumstances," and do not contain information about the standard of care. *Id.*

98. See *id.* Under *Hepp*, *res ipsa loquitur* is called for only in a very narrow set of cases in which the finding of negligence is unreasonable as a matter of law, but is irresistible under common knowledge. *Id.* ("[W]here the facts and circumstances surrounding the injury themselves point with sufficient definiteness to negligence on the part of defendant to warrant an inference thereof, then the reason for [res ipsa loquitur] fails."); see also *supra* part III.A.

99. See Eaton, *supra* note 76, at 44 ("[C]ourts believe that juries unaided by expert guidance are incapable of determining what constitutes 'reasonable care' in a medical context."); *Woods v. Brumlop*, 71 N.M. 221, 377 P.2d 520 (1962) (finding for plaintiff dismissed based on competence of the fact-finder). The *Woods* court reasoned "that the cause and effect of a physical condition lies in a field of knowledge in which only a medical expert can give a competent opinion . . . [Without experts] we feel that the jury could have no basis other than conjecture, surmise or speculation upon which to consider" causation. *Id.* at 225-26, 377 P.2d at 523.

100. See *Hepp*, 37 N.M. at 528, 25 P.2d at 200 ("It (*res ipsa loquitur*) is recognized as a rule of necessity . . . It bases its chief claim to justification on the fact that ordinarily the cause of the injury is accessible to the party charged and inaccessible to the person injured.').

101. See *Louisell & Williams*, *supra* note 57, at 254 (stating that a rational legal order demands "some suitable device to compel the professional man to disclose the facts needed by his patient").

Justice Ransom did not articulate in what way *res ipsa loquitur*, when adequately supported by expert testimony, is consistent with fault-based medical malpractice law.¹⁰² The elements required for *res ipsa loquitur* serve the same function as the elements of ordinary negligence.¹⁰³ The purpose of the expert testimony is to inform the jury sufficiently to allow it to competently decide whether these elements have been satisfied.¹⁰⁴

V. CONCLUSION

In *Mireles*, New Mexico Supreme Court allowed the use of *res ipsa loquitur* in medical malpractice cases. Under Justice Ransom's analysis, the only dispositive issue as to the application of *res ipsa* is the presence of expert evidence supporting each of its elements. Using *res ipsa loquitur*, a plaintiff can now establish a *prima facie* case of medical malpractice based solely on an expert's opinion that the probable cause of the injury was within the scope of defendant's duty, and that the resulting injury is inconsistent with due care. As a result, many medical malpractice plaintiffs will find it less difficult to get to the jury.

TRACY L. RABERN

102. See Eaton, *supra* note 76, at 53-54 ("The use of experts to establish the probabilities of negligence assists the fact finder in a manner consistent with principles of fault and the policies underlying the requirement of expert evidence When evidence of the probability is provided by a qualified expert, a medical defendant remains judged by a standard of care established by his peers.").

103. See N.M. UNIF. JURY INSTRUCTION CIV. 13-1623. The first element, that the injury-causing instrumentality be within the exclusive control of the defendant, tends to establish what proximate cause does in ordinary negligence. Compare KEETON ET AL., *supra* note 2, § 39, at 251 (tends to establish that the cause of injury was within the scope of the defendant's duty to the plaintiff), with *Mireles*, 117 N.M. at 452, 872 P.2d at 870 (exclusive control defined as whether probable cause was one within the defendant's duty to the plaintiff). The second element, that the injury-causing event be of a type that does not ordinarily occur absent negligence, tends to establish what the breach element does in ordinary negligence. See KEETON ET AL., note 2, § 39, at 255-56 (tends to rule out the possibility that the injury is consistent with due care).

104. See Eaton, *supra* note 76, at 54.