# 809.03 MEDICAL NEGLIGENCE - INDIRECT EVIDENCE OF NEGLIGENCE ONLY. ("RES IPSA LOQUITUR").

*(Use for claims arising before 1 October 2011. For claims arising on or after 1 October 2011, use N.C.P.I.-Civil 809.03A.)*

> *NOTE WELL: "Res Ipsa Loquitur" has been approved as an option for liability in medical negligence cases only for "injuries resulting from surgical instruments or other foreign objects left in a [patient's] body following surgery and injuries to a part of the patient's anatomy outside of the surgical field."[1] In any other instance, this instruction should be used with caution.[2]*

The (*state number*) issue reads:

"Was the plaintiff [injured] [damaged][3] by the negligence of the defendant?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to a person's failure to follow a duty of conduct imposed by law. Every health care provider[4] is under a duty

[to use *his* best judgment in the treatment and care of *his* patient][5]

[to use reasonable care and diligence in the application of *his* knowledge and skill to *his* patient's care][6] [and]

[to provide health care in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered].[7]

A health care provider's violation of [this duty] [any one or more of these duties] of care is negligence.[8]

As to the second thing that the plaintiff must prove, the plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

Ordinarily, in order to recover, the plaintiff must prove some negligent act or omission on the part of the defendant and that this act or omission proximately caused *his* [injury] [damage]. Negligence cannot be presumed or inferred from the mere fact of [injury] [damage].[9] However, in certain situations, the law permits you, but does not require you, to infer from the circumstances shown by the evidence that a negligent act or omission has occurred and that it has proximately caused [injury] [damage]. The plaintiff contends that this is a case where the circumstances are such that you

should infer and find that the defendant was negligent and that *his* negligence proximately caused the plaintiff's [injury] [damage]. On the other hand, the defendant denies any negligence on *his* part and

contends that you should not infer or find that *he* was negligent or that *his* negligence proximately caused the plaintiff's [injury] [damage].

The burden of proof on this issue is on the plaintiff. In order for you to infer and find that the defendant was negligent and that *his* negligence proximately caused the plaintiff's [injury] [damage],[10] the plaintiff must prove, by the greater weight of the evidence, four things:

First, the [injury] [damage] which occurred was not an inherent risk of the [operation] [surgery] [(*describe other procedure*)]. [Injury] [damage] is not an inherent risk of the [operation] [surgery] [(*name other procedure*)] if it is not common to that procedure and is not a particular hazard in that type of [operation] [surgery] [(*describe other procedure*)].[11]

Second, direct proof of the cause of the [injury] [damage] is not available to the plaintiff.

Third, the [medical care rendered to] [operation upon] [surgery upon] the plaintiff was under the exclusive control or management of the defendant.

And Fourth, the [injury] [damage] was of a type that would have rarely occurred if the defendant had

[exercised *his* best judgment in the treatment and care of the plaintiff]

[used reasonable care and diligence in the application of *his* knowledge and skill to the plaintiff's care] [and]

[provided health care in accordance with the standards of practice

among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care was provided. In order for you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, what the standards of practice were among members of the same health care profession with similar training and experience situated in the same or similar communities at the time the defendant (*describe health care service rendered, e.g., "operated on the plaintiff*"). In determining the standards of practice applicable to this case,[12] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice rather than your own ideas of the standards].[13]

(Now, members of the jury, I have some additional instructions for you to consider in relation to the [duty] [duties] I have just described. *Select from the following, as appropriate*:[14]

(*Duty to Attend*. A health care provider is not bound to render professional services to everyone who applies. However, when a health care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[15] The failure of the health care provider to use reasonable care and judgment in determining when *his* attendance may properly and safely be discontinued is negligence. Whether *he* has used reasonable care and judgment must be determined by comparison with the standards of practice among members of the same health care profession with

similar training and experience situated in the same or similar communities at the time the health care is rendered.)

(*Highest Degree of Skill Not Required*. The law does not require of a health care provider absolute accuracy, either in *his* practice or in *his* judgment. It does not hold *him* to a standard of infallibility, nor does it require of *him* the utmost degree of skill and learning known only to a few in *his* profession. The law only requires a health care provider to have used those standards of practice exercised by members of the same health care profession with similar training and experience situated in the same or similar communities at the time the health care is rendered.)

(*Not Guarantor of Diagnosis, Analysis, Judgment or Result. NOTE WELL: Use only if an issue of guarantee is raised by the evidence*.[16] A health care provider does not, ordinarily, guarantee[17] the correctness of *his* [diagnosis] [analysis] [judgment as to the nature] of a patient's condition or the success of *his* (*describe health care service rendered*).[18] Absent such guarantee, a health care provider is not responsible for a mistake in *his* [diagnosis] [analysis] [judgment] unless *he* has violated [the duty] [one or more of the duties] I previously described.)

Finally, as to this (state number) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent in any one or more of the ways about which I have instructed you and that such negligence was a proximate cause of the plaintiff's [injury] [damage], then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

1. *Howie v. Walsh*, 168 N.C. App. 694, 699, 609 S.E.2d 249, 252 (2005) (quoting *Grigg v. Lester*, 102 N.C. App. 332, 335, 401 S.E.2d 657, 659 (1991)).

2. *Id*.

3. In death cases, this instruction can be modified to refer to the "decedent's death."

4. A "health care provider" is defined by N.C. Gen. Stat. § 90-21.11 as, "without limitation":

> "any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology"; or "a hospital or a nursing home [licensed under Chapter 131E]"; or "any other person who is legally responsible for the negligence of such person, hospital or nursing home"; or "any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home."

5. *Hunt v. Bradshaw*, 242 N.C. 517, 521, 88 S.E.2d 762, 765 (1955), *quoted with approval in Wall v. Stout*, 310 N.C. 184, 192–93, 311 S.E.2d 571, 576–77, (1984). In *Wall*, Chief Justice Branch, writing for a unanimous court, said:

> "A physician or surgeon who undertakes to render professional services must meet these requirements: (1) He must possess the degree of professional learning, skill and ability which others similarly situated ordinarily possess; (2) he must exercise reasonable care and diligence in the application of his knowledge and skill to the patient's case; and (3) he must use his best judgment in the treatment and care of his patient. [Citations omitted] If the physician or surgeon lives up to the foregoing requirements he is not civilly liable for the consequences. If he fails in any one particular requirement, and such failure is the proximate cause of injury or damage, he is liable."

310 N.C. at 192–93, 311 S.E.2d at 576–77 (quoting *Hunt* 242 N.C. at 521, 88 S.E.2d at 765).

6. *Id*.

7. N.C. Gen. Stat. § 90-21.12 provides the following about the "Standard of health care": In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied "by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or

similar communities at the time of the alleged act giving rise to the cause of action." Prior to this revision to N.C.P.I. Civil 809.00, the "specialist" instruction (former N.C.P.I.-Civil 809.10) was sometimes given. It has been deleted because it is viewed as redundant to the statutory standard.

8. *Wall*, 310 N.C. at 193, 311 S.E.2d at 577.

9. The application of the doctrine of *res ipsa loquitur* in medical negligence actions is "somewhat restrictive." *Schaffner v. Cumberland Cnty. Hosp. Sys.*, 77 N.C. App. 689, 691, 336 S.E.2d 116, 118 (1985). There must be proof that the injury or death would rarely occur in the absence of medical negligence. *Id*. *See also Howie*, 168 N.C. App. at 698, 609 S.E.2d at 251–52 (quoting *Diehl v. Koffer*, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000)):

> "[T]he basic foundation of the doctrine . . . is grounded in the superior logic of ordinary human experience [and] permits a jury, on the basis of experience or common knowledge, to infer negligence from the mere occurrence of the accident itself . . . [I]n order for the doctrine to apply, not only must plaintiff have shown that [the] injury resulted from defendant's [negligent act], but plaintiff must [be] able to show - without the assistance of expert testimony - that the injury was of a type not typically occurring in absence of some negligence by defendant."

*See also Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (expert testimony is not invariably required in all cases). For additional *res ipsa loquitur* analysis, *see also Tice v. Hall*, 310 N.C. 589, 592–94, 313 S.E.2d 565, 567 (1984). *Compare Koury v. Follo*, 272 N.C. 366, 373, 158 S.E.2d 548, 554 (1967); *Starnes v. Taylor*, 272 N.C. 386, 391, 158 S.E.2d 339, 343 (1967); *Cameron v. Howard*, 40 N.C. App 66, 68, 251 S.E.2d 900, 901–02 (1979); *Thompson v. Lockhart*, 34 N.C. App. 1, 7, 237 S.E.2d 259, 263 (1977). If the case involves issues both of direct *and* circumstantial proof of negligence (*i.e., res ipsa loquitur*), N.C.P.I.-Civil 809.05 should be used instead of this charge.

10. This instruction must be modified to add additional elements of proof if there is a question of fact as to whether the defendant is a health care provider as defined by N.C. Gen. Stat. § 90-21.11 or whether the defendant was engaged in furnishing professional health care services to the plaintiff or plaintiff's decedent.

11. *See Schaffner, supra* note 9.

12. For cases arising on or after 1 October 2011, Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the "witness has applied the principles and method reliably to the facts of the case." N.C. R. Evid. 702(a) (2011). *See also* N.C. R. Evid. 702(b) – (f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). In proper cases, lay opinion testimony may be used. See N.C. R. Evid. 701 and *Schaffner*, 77 N.C. App. at 691, 336 S.E.2d at 118 (stating that expert testimony is not invariably required in all cases).

13. *Jackson v. Sanitarium*, 234 N.C. 222, 227, 67 S.E.2d 57, 61 (1951), *Vassey v. Burch*, 45 N.C. App. 222, 225, 262 S.E.2d 865, 867, *rev'd on other grounds*, 301 N.C. 68,

269 S.E.2d 137 (1980). *Whitehurst v. Boehm*, 41 N.C. App. 670, 677, 255 S.E.2d 761, 767 (1979). "There are many known and obvious facts in the realm of common knowledge which speak for themselves, sometimes even louder than witnesses, expert or otherwise." *Gray v. Weinstein*, 227 N.C. 463, 465, 42 S.E.2d 616, 617 (1947), *quoted* in *Schaffner*, 77 N.C. App. at 692, 336 S.E.2d at 118. *See also* other cases cited in *Schaffner*.

14. *NOTE WELL: In* Wall v. Stout, *the court cautions that these instructions should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of the selected instruction.* See Wall, *310 N.C. at 197, 311 S.E.2d at 579.*

15. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

16. *Wall*, 310 N.C. at 197, 311 S.E.2d at 579.

17. Any such guarantees, warranties or assurances must satisfy the "statute of frauds" requirement imposed by N.C. Gen. § Stat. 90-21.13(d), which reads:

> "No action may be maintained against any health care provider upon any guarantee, warranty or assurance as to the result of any medical, surgical or diagnostic procedure or treatment unless the guarantee, warranty or assurance, or some note or memorandum thereof, shall be in writing and signed by the provider or by some other person authorized to act for or on behalf of such provider."

18. *Belk v. Schweizer*, 268 N.C. 50, 56, 149 S.E.2d 565, 570 (1966).