Kenyon v. Gehrig: Are surgical malpractice cases dead in N.C.?

By MARK McGRATH

Imagine the following scenario. Police are called to the house of a prominent businessman. They find the man in bed, quite dead, with a massive laceration to his throat. In the basement of the home, they find a bloody straight razor bearing the fingerprints of his estranged wife and traces of the victim's blood. Upon questioning, the woman confesses that she had been shaving her husband earlier in the day when, suddenly, "there was blood everywhere."

"I must have inadvertently pressed down too hard while I was shaving his neck," she sobs hysterically. Upon further investigation, police determine that the wife had taken out a $5 million life insurance policy on her husband only a week earlier and has recently been seen about town on the arm of a dashing professional badminton player.

At the wife's murder trial, the prosecution calls three pathologists. All testify that, given the depth of the wound, the trauma inflicted upon the victim's bones and tissues, and the amount of blood loss, the wound had to have been caused by the exertion of tremendous pressure by the person wielding the razor, a degree of pressure that is wholly inconsistent with an inadvertent slip of the hand.

In a surprising gambit, the defense moves for dismissal of all charges on the basis that the pathologists and medical examiner have presumed culpability from the fact of the injury itself. As a result, the defense argues, the expert opinions are nothing more than flimsy conjecture. The trial court agrees, dismissing all charges against the defendant.

No person in his right mind would fail to be outraged at such a result. Courts have been allowing experts to formulate opinions based on circumstantial evidence for as long as anyone can remember.

In a remarkable departure from well-established precedent, however, North Carolina's Court of Appeals recently signaled that it will no longer allow opinions based on circumstantial evidence in malpractice cases.The case is Kenyon v. Gehrig, and it is required reading for anyone who dabbles in medical malpractice litigation.

Kenyon v. Gehrig

In Kenyon, 2007 N.C. App. Lexis 1104, 645 S.E.2d 125 (June 5, 2007), plaintiff woke from spine surgery with a severe right femoral neuropathy. In support of her claims, plaintiff offered the testimony of three qualified surgeons, all of whom agreed that the neuropathy was caused by the defendants' misuse of a surgical retractor during the operation. The defendants moved for summary judgment on the basis that the experts had presumed negligence from the mere occurrence of the injury, thus relegating their opinions to the realm of speculation.

In opposition to the defendants' motion for summary judgment, plaintiff produced the deposition testimony of her three surgical experts. All three testified that, more likely than not, and within a reasonable degree of medical certainty and probability, the neuropathy was caused by misuse of the retractor during surgery.

The trial court agreed with the defendants, holding that the three experts had erroneously presumed negligence from the existence of the injury. As a result, the court concluded, their opinions were nothing more than speculation. The Court of Appeals affirmed.

Use of circumstantial evidence

The draconian ruling in Kenyon spells serious trouble for victims of surgical malpractice. Operating room cases present inherent difficulties for plaintiff's lawyers. Typically, when malpractice is committed in an operating room, the patient is out cold, and the only witnesses to the malpractice are the defendants. As you might expect, admissions of operating room negligence are more rare than successful Woodson claims. Making things even more difficult, the physical evidence of malpractice is usually stitched up and tucked away inside the patient's body.

As addressed in Part I of this series, the Court of Appeals has all but eliminated application of res ipsa loquitur to medical malpractice cases. As a result, handling a surgical malpractice case invariably requires the plaintiff to prove his case through the use of circumstantial evidence and an expert's "reconstruction" of the surgery.

What exactly is circumstantial evidence? This is really a second-year law school question, but since the Court of Apeals seems to have gotten things so terribly wrong in Kenyon, it deserves at least passing treatment here.

Circumstantial evidence is evidence of an act or omission that does not arise from direct, contemporaneous observation of an act or omission, but from attendant events and circumstances surrounding that event. For example, if a person hears a gunshot originating from an adjacent room, charges immediately into the room, and finds one man holding a smoking pistol and a second man lying on the ground with a hole in his head, this would constitute strong circumstantial evidence that the person holding the pistol shot the victim. This is hardly exotic stuff.

How does the use of circumstantial evidence come into play in malpractice cases? Here is a fairly characteristic case. We once represented a young woman who awoke from cervical surgery with a total loss of vision in her left eye. The treating ophthalmologist determined that she had suffered a central retinal artery occlusion. Our retinal experts determined that, because there was no evidence of embolism, the artery occlusion could only have been caused by the exertion of pressure on the eye during surgery. During discovery, we learned that a device called a horseshoe headrest had been used during the operation and that there were numerous reports of vision loss following surgeries that involved the use of a horseshoe headrest.

We had the case reviewed by a number of anesthesiologists. Our experts concluded that the only way that pressure could have been applied to the eye was negligent positioning of the patient's face in the headrest prior to surgery or the failure to monitor the positioning of the patient's face during the operation. Our experts opined that either failure would constitute malpractice.

The defendants denied the injury was attributable to a positioning error. They argued they were meticulous in positioning the patient's face in the headrest and that they had vigilantly monitored her positioning during surgery. Our experts contradicted this testimony by proving, through circumstantial evidence, that a positioning error was the only explanation for the injury. That case settled on the eve of trial without a motion for summary judgment being filed.

Circumstantial evidence in Kenyon

In Kenyon, as in most surgical malpractice cases, the experts for the plaintiff based their standard-of-care opinions on circumstantial evidence. In Kenyon, the quantum of evidence presented by the plaintiff in opposition to the motion for summary judgment equaled or exceeded that which has consistently passed muster in such cases. The circumstantial evidence of negligence included the following:

Notations in the plaintiff's medical records indicating that her neuropathy was "thought to be possibly due to femoral nerve palsy from the [surgical] retractors";

Evidence that the plaintiff was admitted to the hospital with no nerve injury and emerged from the operation with an injury to the femoral nerve;

Evidence that the defendants were applying the retractors close to the plaintiff's femoral nerve;

Evidence that, for many, many years, retractors used during the plaintiff's surgery had been known to be associated with femoral nerve palsy;

And the lack of any evidence indicating another cause for the femoral nerve palsy.

Three qualified surgeons reviewed and synthesized this evidence and concluded that, within a reasonable degree of medical and surgical certainty, the injury was the result of improper application and use of the retractor.

The court held that the plaintiff's experts, "while clearly opining that defendants are at fault, gave no concrete reasons for this belief." The court went on to conclude that "[e]ssentially, all of plaintiff's experts testified that their opinions were based on the fact of the injury itself. Although they each, to varying degrees, put forth hypotheses as to the potential causes of the injury, none of them could point to any evidence of an act or omission, other than the existence of the injury itself, constituting negligence on the part of either defendant." As a result, "their assignation of negligence on defendants' part constituted mere speculation."

Mere speculation! That is rather like saying that, in our hypothetical case of the razor-wielding wife, the testimony of the three pathologists and the medical examiner was mere speculation. When three doctors testify with a reasonable degree of medical and surgical certainty that a given event occurred in a certain way, they are not speculating. They are rendering expert opinions, based on the application of their education, training and experience to the available evidence.

In Kenyon, the Court of Appeals has mistaken inferential reasoning for mere speculation. In Kenyon, the three experts were not making a leap of faith based upon the injury alone. Rather, they used the nature of the injury as a starting point from which they worked backward and formulated theories and opinions as to what took place in the operating room. Availing themselves of the available circumstantial evidence, the experts formed opinions that certain acts and omissions on the part of the defendants were, more likely than not, the cause of the plaintiff's femoral nerve palsy. Finally, having identified by way of expert testimony the acts and omissions that were committed by the defendants during surgery, the experts further testified that the commission of those acts and omissions fell short of the applicable standard of care.

Presuming negligence from the fact of an injury can be illustrated by the following example: A patient wakes from routine hip surgery with a severe burn to his chest. Experts for the patient testify that, while they are not certain what caused the burn, the burn has to be the product of negligence. Unexplained burns to remote body parts do not occur during a properly performed surgery. Reduced to its essential terms, presuming negligence from the fact of injury is res ipsa loquitur.

This, however, is not the kind of exercise in which the Kenyon experts were engaged. In Kenyon, the experts began with the injury (a femoral nerve palsy), assessed and synthesized the available evidence (e.g., surgery was being performed in the vicinity of the femoral nerve; the retractors used by the defendants have long been associated with femoral nerve palsies; the lack of any other viable explanation for the injury), identified the instrumentality that caused the injury (the retractor), identified the act responsible for causing that injury (misapplication of the retractor), and then formed an ultimate opinion that the defendants, in misapplying the retractor, deviated from the standard of care.

In any surgical malpractice case where there are no admissions of culpability (and there never are), it will always be the task of the plaintiff to assemble the available circumstantial evidence into a hypothesis of what actually occurred. If our courts will longer allow such challenges to the memories and veracity of surgical team defendants, we have arrived at a sorry and unhappy place, to be sure.

Conclusion

Twenty years ago, the Kenyon plaintiff would almost certainly have reached the jury on a res ipsa loquitur theory without having to hire expert witnesses. That she did not make it to a jury with the assistance of three qualified experts shows just how far our Court of Appeals has retreated toward the judicial dark ages in the intervening decades.

Rejecting the expert opinions at issue in Kenyon reveals either a profound misunderstanding of basic tort principles or an unabashed inclination to engage in judicial tort reform. This much is certain. If the evidence of malpractice presented by the Kenyon plaintiff is no longer sufficient to carry a surgical malpractice case to a jury, and given the effective abolition of res ipsa loquitur in malpractice cases, one could reasonably conclude that there no longer such thing as a surgical malpractice case in the state of North Carolina. If Kenyon withstands further judicial scrutiny, all a surgical defendant will have to do in the future is deny negligence, testify that he did everything properly, and then rest assured that the case will not reach the jury.

For those of us who see egregious examples of surgical malpractice every day, this is a frightening prospect indeed.