

Skin Burned In OR: Negligence Not Presumed.

The patient suffered burns to her left underarm and breast skin during orthopedic surgery on her right shoulder. She sued the surgeon as well as the hospital where the surgery was performed.

According to the New York Supreme Court, Appellate Division, the trial became a battle of the experts.

The surgeon's medical expert testified the patient's injury had to have come from an IV bag that was used in positioning the patient having been heated beforehand to a dangerously high temperature by the hospital's perioperative nursing personnel.

The hospital's medical expert testified the patient's injury had to have come from lying on padding saturated with Betadine, which can be a caustic substance.

The principle of res ipsa loquitur (it speaks for itself) is often applied in O.R. lawsuits when an unconscious patient has no way of knowing which of those in control did what.

The principle allows, but does not require, a jury to infer negligence simply on the basis of a bad result.

NEW YORK SUPREME COURT
APPELLATE DIVISION
March 16, 2007

The jury was unable to find the surgeon or the hospital negligent.

The judge, nevertheless, threw out the verdict, ruling that either the surgeon or the hospital had to be negligent, or both, as there was no rational basis for the jury to find neither one of them negligent.

The Appellate Division, however, said the judge misunderstood the law. It reversed the judge's decision and reinstated the no-liability verdict for both defendants.

Boling v. Stegemann, __ N.Y.S.2d __, 2007 WL 778621 (N.Y. App., March 16, 2007).