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Negligence-Res Ipsa Loquitur-Application to Medical Malpractice Actions: 1951-196

Peter D. Byrnes S.Ed.
University of Michigan Law School

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NEGLIGENCE—*Res Ipsa Loquitur*—APPLICATION TO MEDICAL MALPRACTICE ACTIONS: 1951-1961—*Res ipsa loquitur*, “the thing speaks for itself,” has been the subject matter of extensive legal literature¹ since its inception almost a century ago.² It is now well settled that *res ipsa loquitur* is no more than an inference of negligence from circumstantial evidence.³ The doctrine is applicable⁴ if an act or occurrence is of the type that ordinarily would not take place without negligence, assuming the plaintiff has himself been passive, and if the instrumentality causing the harm is within the exclusive control of the defendant.⁵ The application of *res ipsa loquitur* to the medical malpractice area has introduced a number of problems, both legal and philosophical, resulting in a wide diversity of opinion as to whether the doctrine should be any more sparingly applied in medical negligence cases than it should in cases of exploding bottles, airplane crashes or

¹ See, e.g., Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949).

² “There are certain cases of which it may be said *res ipsa loquitur*” Byrne v. Boadle, 2 H & C 722, 725, 159 Eng. Rep. 299, 300 (1863).

³ 2 HARPER & JAMES, TORTS § 19.11 (1956); PROSSER, TORTS § 42 (2d ed. 1955).

⁴ The statement of the requirements of *res ipsa loquitur* most often referred to is that of Erle, C. J., in *Scott v. London & St. Katherine Docks Co.*, 3 H & C 596, 601, 159 Eng. Rep. 665, 667 (1865). See also 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940); PROSSER, *op. cit. supra* note 3, at 199.

⁵ Different writers have given various verbalizations to this requirement. See, e.g., PROSSER, *op. cit. supra* note 3, at 199: “The apparent cause of the accident is such that defendant would be responsible for any negligence connected with it”

similar unexpected events.⁶ It is often stated that expert medical testimony is a prerequisite to the establishment of a malpractice claim, except in the clearest of cases where it can be said that "the result speaks for itself."⁷ Judicial reluctance to expand the number of cases in which expert testimony is not required has been the foremost obstacle to the invocation of the doctrine. The reasoning of the courts appears to be that, in a majority of cases of alleged malpractice, it is beyond the capability of a jury of laymen to decide whether a particular event is of the type that ordinarily would not take place had due care been exercised. Thus, a failure to fulfill the first requirement renders the doctrine unavailable. Whether or not such an approach is too formalistic is arguable. There are, however, valid arguments that can be suggested for permitting the use of *res ipsa loquitur* in the medical negligence field. First, although expert testimony would be desirable, it is often impossible to procure. The general reluctance of physicians to testify against one another is well known, although characterization of this as a "conspiracy of silence" is questionable.⁸ But regardless of the motivation for their unwillingness,⁹ it is clear that a plaintiff in a medical malpractice action operates under a serious handicap in obtaining expert medical witnesses. Second, in many cases of medical or surgical treatment the knowledge of the facts is peculiarly within the possession of the doctor.¹⁰ More often than not, the plaintiff was unconscious or totally ignorant of the procedures that were employed. Third, the confidence and trust reposed in the doctor by a patient demands that the former come forward with some explanation of what went wrong.¹¹ Fi-

⁶ In *Mogensen v. Hicks*, 110 N.W.2d 563, 565 (Iowa 1961), the court, in discussing the application of *res ipsa loquitur* to a case involving allergic reaction to an anesthetic, stated, "The doctrine of *res ipsa loquitur* should be used sparingly." To the same general effect, see *Morris, "Res Ipsa Loquitur"—Liability Without Fault*, 25 INS. COUNSEL J. 97 (1958). However, in *Maki v. Murray Hosp.*, 91 Mont. 251, 264, 7 P.2d 228, 231 (1932), it was stated that "while the application of the doctrine is usually made in view of injury by machinery . . . , from its very nature as a doctrine of necessity it should apply with equal force in cases wherein medical and nursing staffs take the place of machinery and may, through carelessness or lack of skill, inflict, or permit the infliction of, injury upon a patient who is thereafter in no position to say how he received his injuries."

⁷ *Nelson v. Murphy*, 42 Wash. 2d 737, 738-39, 258 P.2d 472, 474 (1953).

⁸ LOUISELL & WILLIAMS, *TRIAL OF MEDICAL MALPRACTICE CASES* ¶ 14.02 (1960) and authorities cited therein.

⁹ See *id.* at ¶ 14.03.

¹⁰ See *Seneris v. Haas*, 45 Cal. 2d 811, 825, 291 P.2d 915, 923 (1955).

¹¹ See *Cho v. Kempler*, 177 Cal. App. 2d 342, 349, 2 Cal. Rptr. 167, 171 (1960).

nally, it is maintained that the doctrine should not be any less available to a plaintiff merely because he happens to be suing a doctor, rather than a bottle manufacturer or an airline.

On the other hand, it must be borne in mind that a physician is not a warrantor of cures, and, in the interest of fairness, a careful vigil must be maintained to insure that his liability is based upon fault. Because the application of *res ipsa loquitur* is virtually tantamount to success for the plaintiff,¹² and because of the undesirability of holding a physician responsible for every untoward result, restrictive application of the doctrine is often urged.¹³ Thus, the *res ipsa loquitur* medical malpractice cases bring into direct conflict the aims of securing a reasonable opportunity for redress to the innocent patient who is injured by medical treatment, while at the same time protecting from liability the physician who has been free from fault. No easy solution of this dilemma is evident; however, an examination of how the courts have handled the problem during the last decade may reveal more clearly the nature of the problems involved and, at the same time, expose to the light of recent experience a few of the more popular theories concerning judicial treatment of the *res ipsa loquitur* doctrine in medical malpractice cases.

Increasing Judicial Acceptance of Res Ipsa Loquitur?

There has been a great deal of alarm expressed by legal writers about the increasing application of the *res ipsa loquitur* doctrine to the medical malpractice area.¹⁴ The publicity given to a few decisions, the desire to find trends in the law, and the dire warnings periodically issued by interest groups have probably all contributed to this widespread belief. But the fear that the courts are applying the doctrine with increasing frequency and decreasing deliberation seems unwarranted in light of a survey of those appellate decisions which dealt with the use of *res ipsa loquitur* in medical negligence cases during the period 1951-1961.

In every case included in the survey, the applicability of the

¹² "Plaintiffs rarely lose *res ipsa loquitur* cases at the jury's hands, except where a defendant's explanation of the accident is factually very convincing (a relatively rare occurrence)." 2 HARPER & JAMES, *op. cit. supra* note 3, at 1099.

¹³ Morris, *supra* note 6, at 113.

¹⁴ E.g., Morris, *Res Ipsa Loquitur—A Rule of Sympathy* in PROCEEDINGS, A.M.A. REGIONAL MEDICOLEGAL SYMPOSIUMS 66 (1961); REGAN, DOCTOR AND PATIENT AND THE LAW § 30, at 214 (3d ed. 1956); Morris, *supra* note 6.

res ipsa loquitur doctrine, whether dealt with by name or not, was the subject matter of judicial decision, although not necessarily the *ratio decidendi* of the particular case. All in all, ninety-two cases arising in thirty-one different jurisdictions were analyzed and, although such a study is not all-inclusive, it does include all the cases that could be readily located through legal indexes and undoubtedly is fairly representative of all the cases actually decided during this period.

In 56.5 percent of the 92 cases studied the courts rejected the *res ipsa loquitur* doctrine; in 36.9 percent they accepted it, while in 6.5 percent of the cases the courts discussed its applicability but neither accepted nor rejected the doctrine, as shown in the following table:

Year	Applied	Rejected	Discussed but not Applied or Rejected	Total
1951	2	5		7
1952	2	1		3
1953	2	7	1	10
1954	2	3		5
1955	5	5		10
1956	2	4	2	8
1957	5	2	2	9
1958	4	9		13
1959	4	5		9
1960	3	4	1	8
1961	3	7		10
	—	—	—	—
	34	52	6	92

As can be seen, there was a tendency for the number of such cases presented to appellate courts to increase somewhat over the course of the decade, although the increase is hardly startling and may reflect nothing more than the increase of the incidence of medical treatment. More importantly, there was a surprising consistency throughout the decade in the rate of judicial rejection of the doctrine. The rate of rejection in the cases in which application of the doctrine was either accepted or rejected ranged from about one-half to two-thirds of the cases in any given three-year period, and for most of the three-year periods the rejection rate varied only between 55 and 65 percent.¹⁵ And the rate of rejec-

¹⁵ By combining the data from the table in the text into three-year periods, the wide variations of individual years are eliminated.

(Continued on bottom of next page)

tion at the end of the decade was not significantly different from that at the beginning.

For the individual states there is somewhat more variation because of the small number of cases involved, but, even so, similar generalizations can be made. For example, in California, which far surpasses any other state in the total number of *res ipsa loquitur* cases before the courts in the last decade, there have been 30 *res ipsa loquitur*-medical malpractice cases in the ten years since 1951. In 16 of the cases the courts applied the doctrine, in 12 instances it was rejected, and in two cases a final decision as to its applicability was not reached.

Although there are many inferences which might be drawn from these figures—involving a wide range of assumptions and hypotheses—the reader should be cognizant of the perils involved in making facile conclusions about what is going on in the trial courts from a tally of results in appellate court decisions. While it might be said that appellate cases are merely a reflection of trial court problems, there is no necessary correlation between the number or proportion of appellate applications of the *res ipsa loquitur* doctrine and the number of cases in which the doctrine is applied in the trial courts. Even farther removed from the realm of valid inference is the number of instances in which a claim is made against a physician for malpractice where there is no direct evidence of negligence and the case is settled before a suit is filed. Nevertheless, although one must be careful not to over-generalize, appellate decisions can tell us a good deal. At the very least, it can be said that there is nothing in the data to support the charge that the courts are moving rapidly in the di-

15 (Continued)

Year	Cases Deciding Issue	Rejections	Percent of Rejections
1951-53	19	13	68%
1952-54	17	11	65
1953-55	24	15	62
1954-56	21	12	57
1955-57	23	11	48
1956-58	26	15	58
1957-59	29	16	55
1958-60	29	18	62
1959-61	26	16	62

rection of increased use of the *res ipsa loquitur* doctrine in the medical negligence area.

The Problem of Predictability

Of course, like all statistics, these tell us little or nothing about any particular case, and the foremost difficulty confronting the legal profession in this area of the law is the absence of any degree of predictability as to the application of the *res ipsa loquitur* doctrine to any given case which involves an allegation of medical malpractice without specific evidence of negligence. To illustrate the problem, let us assume a not-so-hypothetical fact situation in which a patient was treated for a fractured limb by a physician who reduced the fracture and placed the limb in a cast which was so tight that the circulation of the patient's blood was seriously impaired, and as a result amputation of the limb was required.

In *Eckleberry v. Kaiser Foundation No. Hosps.*,¹⁶ the Supreme Court of Oregon, on facts similar to those stated, affirmed a judgment for defendant doctor, holding that *res ipsa loquitur* did not apply to malpractice cases. Yet, on substantially similar facts, the Iowa Supreme Court, in *Daiker v. Martin*,¹⁷ reversing the lower court, applied the doctrine. Although these cases arose in different jurisdictions, they, nevertheless, serve as a typical illustration of the inconsistency discoverable in the *res ipsa loquitur* malpractice field.¹⁸

Because of the consequence of judicial acceptance of *res ipsa loquitur* and because of the uncertainty which has been characteristic of its application to malpractice cases, many attempts have been made to categorize the types of cases in which the doctrine will apply, and those in which it will not.¹⁹ With but few exceptions, such classifications are of doubtful value, for not only do they mislead by creating an impression of being legally exclusive classes (which they are not), but they also tend to conceal the uncertainty which has been characteristic of the decisions. Their

¹⁶ 226 Ore. 616, 359 P.2d 1090 (1961).

¹⁷ 250 Iowa 75, 91 N.W.2d 747 (1958).

¹⁸ Compare *Demchuck v. Bralow*, 404 Pa. 100, 170 A.2d 868 (1961), and *Robinson v. Wirts*, 387 Pa. 291, 127 A.2d 706 (1956), with *Klein v. Arnold*, 203 N.Y.S.2d 797 (Sup. Ct. 1960). All of these cases involved a punctured esophagus occurring during a gastroscopic examination.

¹⁹ E.g., LOUISELL & WILLIAMS, *op cit. supra* note 8, ¶ 14.06.

only justification seems to be for illustrative purposes, but even there their value is questionable because of the danger that they will induce unwarranted reliance on the part of the practicing attorney.

One of the traditional categories where it is said that *res ipsa loquitur* will apply is when the alleged injury is to a healthy area remote from the area of treatment or operation.²⁰ The rationale behind such a distinction appears to be that it is within the ability of a lay jury to say, for example, that in a spinal operation a patient does not, without negligence, ordinarily receive a burn on the abdomen.²¹ The Michigan Supreme Court, however, in affirming a judgment *non obstante veredicto* for the defendants, refused to recognize such a distinction, in a case where a patient's ureter was sutured (healthy area) during surgery upon the plaintiff for lysis of bowel adhesion and relief of bowel obstruction, despite expert medical testimony to the effect that the ureter was not the subject matter of such an operation nor was it standard practice to suture it.²² The court, in reaching such a result, relied upon the failure of the plaintiff to produce expert testimony to the effect that this was negligent notwithstanding the hemorrhaging which purportedly created an emergency situation. Although Michigan denies that it applies *res ipsa loquitur* in any case,²³ the courts have been quite willing to accept an inference of negligence from circumstantial evidence which is the legal equivalent.²⁴ Furthermore, there have been a substantial number of cases in the last decade which, although not discussing such a proposed category have, in essence, similarly rejected it.²⁵

A traditional class where it has been suggested that *res ipsa loquitur* is inapplicable is where the plaintiff has been the victim of an adverse result of a medical technique known to produce

²⁰ Frost v. Des Moines Still College of Osteopathy, 248 Iowa 294, 79 N.W.2d 306 (1957); Higdon v. Carlebach, 348 Mich. 363, 83 N.W.2d 296 (1957); LOUISELL & WILLIAMS, *op. cit. supra* note 8, ¶ 14.06 at 439.

²¹ Frost v. Des Moines Still College of Osteopathy, *supra* note 20.

²² Lince v. Monson, 363 Mich. 135, 108 N.W.2d 845 (1961).

²³ *E.g.*, Loveland v. Nelson, 235 Mich. 623, 209 N.W. 835 (1926).

²⁴ *E.g.*, LeFaive v. Asselin, 262 Mich. 443, 247 N.W. 911 (1933). See also Loveland v. Nelson, *supra* note 23.

²⁵ *E.g.*, McDermott v. St. Mary's Hosp., 144 Conn. 417, 133 A.2d 608 (1957) (burns on legs during contraction of uterus); Rhodes v. DeHaan, 184 Kan. 473, 337 P.2d 1043 (1959) (injury to arm in connection with an abdominal operation); Smith v. American Cystoscope Makers, 44 Wash. 2d 202, 266 P.2d 792 (1954) (burns and a wrenched back during a prostate gland operation).

some untoward results on occasion, notwithstanding the exercise of due care.²⁶ Cases falling within such a class have been denominated the so-called "calculated risk" cases. The apparent reason for the rejection of the doctrine in such a case is the inability to say that this injury is of the type that ordinarily would not occur without negligence.²⁷ Multitudinous problems are involved in determining whether a particular treatment or operation contains some element of risk, the primary one being the evidentiary problem of establishing the risk itself. Whether statistics are admissible for this purpose, assuming that they are available (which is often not the case), or whether the past experience of the defendant or even of his expert witnesses are relevant, and the weight to accord such evaluations, are problems lacking in an easy solution. Leaving such issues aside, however, and assuming that a particular calculated risk is generally accepted, the recurrent question of judicial treatment of such a case leads to the conclusion that uniformity of result is largely a myth.²⁸ Exemplary of this position is the case of partial or complete paralysis following the administration of a spinal anesthetic.²⁹ In *Hall v. United States*,³⁰ the plaintiff was admitted to the hospital as a routine obstetrical case. Following receipt of a spinal anesthetic, plaintiff developed paralysis resulting in the loss of control over her bladder, bowels and legs. The court, in rejecting the *res ipsa loquitur* principle, relied on the failure of the plaintiff to prove that the injury would not have occurred without negligence.³¹ However, in a case decided the same year by the Supreme Court of California, *res ipsa loquitur* was applied to substantially similar facts.³²

To condemn all classifications, without recognizing that in a few situations there is some unanimity of opinion, is to do an injustice. The situation which appears to have produced the

²⁶ See *Farber v. Olkon*, 40 Cal. 2d 503, 254 P.2d 520 (1953); *Engelking v. Carlson*, 13 Cal. 2d 216, 88 P.2d 695 (1939); Comment, 30 So. CAL. L. REV. 80 (1956).

²⁷ Comment, 30 So. CAL. L. REV. 80 (1956).

²⁸ There is a possible exception with respect to the electroshock treatment cases where, for the most part, there has been uniformity. See, e.g., *Farber v. Olkon*, 40 Cal. 2d 503, 254 P.2d 520 (1953); *Quinley v. Cocke*, 183 Tenn. 428, 192 S.W.2d 992 (1946).

²⁹ See Comment, 30 So. CAL. L. REV. 80, 85 (1956).

³⁰ 136 F. Supp. 187 (W.D. La. 1955), *aff'd*, 234 F.2d 811 (5th Cir. 1956).

³¹ *Accord*, *Ayers v. Parry*, 192 F.2d 181 (3d Cir. 1951).

³² *Seneris v. Haas*, 45 Cal. 2d 811, 291 P.2d 915 (1955). See also *Bauer v. Otis*, 133 Cal. App. 2d 439, 284 P.2d 133 (1955); *Toy v. Rickert*, 53 N.J. Super. 27, 146 A.2d 510 (1958).

most agreement is the so-called foreign body case, where, in general, the courts have been willing to say that "the thing speaks for itself." Resort to the first requirement of the doctrine has been characteristic of the judicial attitude, the proposition being that it is within the common knowledge of laymen that surgical needles,³³ forceps,³⁴ sponges,³⁵ cloth sacks,³⁶ rubber tubes,³⁷ and Kelly clamps³⁸ are not ordinarily left in a patient's body in the absence of negligence. However, in *Landsberg v. Kolodny*,³⁹ the court asserted that *res ipsa loquitur* was rebutted by a showing on the part of the defendant that causing a mesh of cotton gauze to become embedded in the plaintiff's abdomen was attributable to an emergency situation and not to a lack of due care on defendant's part.

Another category which appears to contain a measure of validity is that of the mistaken diagnosis where it is generally held that the *res ipsa loquitur* doctrine is inapplicable.⁴⁰ The reasoning is not that a doctor cannot be held liable for a faulty diagnosis, but rather that in most cases expert testimony is a prerequisite to liability because "jurors and courts do not know and are not permitted arbitrarily to say what are the proper methods of diagnosing and treating human ailments."⁴¹ Thus, support for a classification is once again sought in the first requirement of *res ipsa loquitur*, resulting in the possibility that a court might, on the proper set of facts, be willing to say that even a lay juror would know that a particular erroneous diagnosis would not ordinarily occur in the absence of negligence.⁴²

The inadequacy of the attempted classifications and the general pattern of uncertainty characteristic of the *res ipsa loquitur*-medical negligence field are attributable to a number of factors. Much of the confusion in this area is directly attributable to the

³³ *Bowers v. Olch*, 120 Cal. App. 2d 108, 260 P.2d 997 (1953).

³⁴ *Swanson v. Hill*, 166 F. Supp. 296 (D.N.D. 1958).

³⁵ *Dietze v. King*, 184 F. Supp. 944 (E.D. Va. 1960).

³⁶ *Tiller v. Von Pohle*, 72 Ariz. 11, 230 P.2d 213 (1951).

³⁷ *Mondot v. Vallejo Gen. Hosp.*, 152 Cal. App. 2d 588, 313 P.2d 78 (1957).

³⁸ *Leonard v. Watsonville Community Hosp.*, 47 Cal. 2d 509, 305 P.2d 36 (1956).

³⁹ 145 Cal. App. 2d 158, 302 P.2d 86 (1956).

⁴⁰ See *Crovella v. Cochrane*, 102 So. 2d 307, 311 (Fla. 1958); LOUISELL & WILLIAMS, *op. cit. supra* note 8, ¶ 14.06, at 437.

⁴¹ *Crovella v. Cochrane*, *supra* note 40, at 310.

⁴² See *Weintraub v. Rosen*, 93 F.2d 544 (7th Cir. 1937); *Friedman v. Dresel*, 139 Cal. App. 2d 333, 293 P.2d 488 (1956); *Foose v. Haymond*, 135 Colo. 275, 310 P.2d 722 (1957).

judicial treatment of the first requirement of *res ipsa loquitur*—that the occurrence is of the type that ordinarily would not take place without negligence. The general proposition with which the courts normally begin is that expert medical testimony is a prerequisite in a malpractice case except where it can be said that a “thing speaks for itself.” In deciding upon whether to instruct the jury on the requirements of the doctrine, the court must initially determine whether it believes the jury capable of passing upon the question of whether this result would normally occur in the absence of negligence. If a court determines that a jury of laymen is competent to answer this question upon the facts of a given case, instructions are then given to the effect that if the jury finds the three requirements to exist they are permitted to draw an inference of negligence. Here the court itself is, in essence, first determining whether this event would ordinarily take place without negligence. If, on the other hand, a court concludes that upon a particular factual situation a jury of laymen is incapable of resolving such a question, the request for instruction upon *res ipsa loquitur* will be denied. The two points which give rise to all the confusion are as follows. First, in making the initial decision on the question of whether a jury possesses sufficient experience to decide if a particular event would occur without negligence, the courts are substituting not merely their common knowledge, which in itself might not be of great consequence, but general considerations concerning the legitimacy of plaintiff’s claim. This results in the inability to say that, on any specific set of facts, the courts in the future will reach a similar decision. The second point giving rise to the confusion is the lack of clarity of reasoning by the courts when they decide against application of the doctrine upon a certain set of facts. Many courts, rather than saying that this injury does not speak for itself and, therefore, is not an exception to the rule that expert medical testimony is a prerequisite to a malpractice claim, state that *res ipsa loquitur* does not apply because there is no expert testimony. Such a difference may appear to be merely semantic, but it is not. The latter proposition not only opens up the possibility that expert testimony may be used to lay a foundation for the application of the doctrine,⁴³ but is also restrictive in nature because it tends to create an impression that expert testi-

⁴³ See *Costa v. Regents of Univ. of Cal.*, 116 Cal. App. 2d 445, 254 P.2d 85 (1953).

mony is a prerequisite to instruction upon the *res ipsa loquitur* doctrine.

Because of the relative paucity of *res ipsa loquitur*-medical malpractice cases being presented to the courts, elaborate suggestions at reformation are impractical. However, the following suggestion, although minimal, might alleviate some of the uncertainty and present a more equitable approach to both the doctor and the patient. If a plaintiff in a malpractice action pleads *res ipsa loquitur* and the case is not one where it is quite obvious that there has been negligence, as in the sponge cases, the court should call an expert medical witness to testify solely on the question of whether this result would have occurred in the absence of negligence. The witness is not called upon to condemn a fellow practitioner, but merely to say whether such a result is an expectable one. If the witness (or witnesses, depending on the court's discretion) testifies that the injury could normally take place without negligence, *res ipsa loquitur* is inapplicable. On the other hand, if he testifies that such a result is somewhat extraordinary, the doctrine is applied and the defendant must come forward and rebut the inference. Of course, factual distinctions which appear to be slight may, nevertheless, lead to different outcomes and the present significance of the application of the doctrine may not be diminished to any noteworthy degree, but such an approach would accomplish several things. First, it would eliminate the problems encountered by a patient in attempting to obtain expert testimony, at least in those cases where he intends to rely on the *res ipsa loquitur* doctrine. Second, it would substitute informed objective testimony for what is often subjective judicial appraisal of the claim, although a court would certainly not be bound by the expert's testimony. Finally, by rationalizing the process it would hopefully add a degree of certainty and predictability to an area which is at present plagued by a lack of such qualities.

Peter D. Byrnes, S.Ed.