

CHAPTER 2

THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE CASES IN SOUTH AFRICA

2.1 INTRODUCTION

Certain accidents happen in a manner which is unexplained but carries a high probability of negligence and although there is no direct evidence regarding the defendant's conduct the court is permitted to draw an inference of negligence by applying the doctrine of *res ipsa loquitur*¹.

Res ipsa loquitur means that the facts speak for themselves and is regarded as a method by which a plaintiff can advance an argument for purposes of establishing a *prima facie* case to the effect that in the particular circumstances the mere fact that an accident has occurred raises a *prima facie* factual presumption that the defendant was negligent. How cogently

¹ Hoffmann and Zeffertt 551; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 144; Claassen and Verschoor 27; Schmidt and Rademeyer *Bewysreg* (2000) 174.

such facts speak for themselves will depend on the particular circumstances of each case ².

In this chapter the origin and development of the doctrine is traced and the general requirements for the application of the doctrine, the nature –and effect of the application of the doctrine on the *onus* of proof and the nature of the defendant’s explanation in rebuttal are expounded.

A detailed exposition of the application of the doctrine to medical negligence cases in particular, follows thereafter, with reference to case law and legal opinion. The judgment in **Van Wyk v Lewis** which had the effect that the doctrine cannot find application to medical negligence cases, is examined in detail and also subjected to critical analysis. This chapter is concluded with a synopsis of the legal principles which are applied when the doctrine is invoked generally.

²Macintosh and Norman-Scoble *Negligence in Delict* (1970) 496; McKerron *The Law of Delict* (1971) 43. See also: Boberg *The Law of Delict* (1989) 378ff; Neethling Potgieter and Visser *Law of Delict* (1994) 141 307.

2.2 THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN SOUTH AFRICA

The earliest reference to the doctrine of *res ipsa loquitur* in South African case law seems to be that of **Gifford v Table Bay Dock and Breakwater Management Commission**³. The relevant facts indicate that the plaintiff in his capacity as Master and Captain in command of a vessel known as *The China* instituted proceedings against the defendants for the recovery of damages after *The China* had been wrecked when it fell off a cradle of a patent slip which had been under the management and control of the defendants at the time⁴. De Villiers CJ held that as there was evidence in this case of actual negligence, the court did not consider it necessary to deal in detail with the question as to whether the accident which befell *The China* was of such a nature as to raise a presumption of negligence which would result in the casting of the burden of proof on the defendants to repel the presumption.

³ 1874 Buch 962 118.

⁴ The vessel was described as follows: “She was short, and very deep, and had a very fine bottom; in fact she had these peculiarities of shape which would necessitate every available precaution in supporting and slipping her”.

The court nevertheless answered the question as to the defendants' negligence in the affirmative and after briefly referring to the Roman Law⁵ proceeded to discuss the legal position in England and approved of the formulation of the doctrine by Erle CJ⁶.

Some thirteen years later an action was instituted by a passenger who was injured in a tram-car accident against the proprietors of the tram-car. In this instance the court held that the circumstances of the accident raised a presumption of negligence which cast a burden on the defendants to rebut the presumption⁷.

⁵ The Roman Law in some instances, presumed negligence on the part of the defendant which cast a burden of disproving it on the defendant. See for example Digest 19 2 13 § 6: "*Si fullo vestimenta polienda acceperit, eaque mures roserint, ex loco tenetur: quia debuit ab hoc re cavere*"; The term *res ipsa loquitur* was however first employed by Cicero in 52 BC in his defence of Milo. (Pro Milone 20.53: "*Res loquitur ipsa, iudices, quae semper valet plurimum. Si haec non gesta audiretis, sed picta videretis, tamen appareret uter esset insidiator, uter nihil cogitaret mali...*") This passage has been translated as follows: "The matter speaks for itself, judges, such always having the greatest validity. If you were not listening to an account of that which has been done, but were looking at a picture thereof, it would nevertheless be clear which of the two was the waylayer and which was considering no evil..." quoted by Cooper *Delictual Liability in Motor Law* (1996) 98. See also **Groenewald v Conradie 1965 1 SA 184 (A) 187 F.**

⁶ **Scott v London and St Katherine's Dock Co (1865) H & C 596 601.**

⁷ **Packman v Gibson Bros (1887) 4 HCG 410.**

Laurence J (Solomon and Cole JJ concurring) referred with approval to the judgment in the **Gifford** case and reiterated that the judgment in the **Scott** case remained the leading authority on the subject ⁸.

During the ensuing years South African courts have applied the doctrine to various facts and circumstances so that it evolved gradually until it became firmly entrenched and an important evidential tool in the armoury of a plaintiff in certain cases. Although there is no *numerus clausus* of the type of cases where the doctrine has been applied it would seem that the courts are willing to apply the doctrine provided that certain requirements are met but with the marked exception of its application to medical negligence

⁸ At 418. Laurence J also referred to the textbook of Smith *On Negligence* (1880) 164, who described the doctrine as follows: “There are (sic) a class of cases in which there has been no direct evidence of any particular act of negligence, beyond the mere fact that something unusual has happened, which had caused the injury; and upon the maxim, or rather phrase, *res ipsa loquitur*, it has been held that there is evidence of negligence...if something unusual happens with respect to the defendant’s property, or something over which he has the control which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant’s act, the occurrence being unusual is said (in the absence of explanation) to speak for itself, that such act was negligent”.

cases⁹.

2.3 REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE IN SOUTH AFRICAN LAW

2.3.1 INTRODUCTION

It has generally been accepted that doctrine of *res ipsa loquitur* will only be

⁹ For examples of cases where the doctrine has been applied see: **Cowell v Friedman and Co (1888) 5 HGC 22** (plaintiff was knocked down by a runaway horse); **Block v Pepys 1918 WLD 18** (bursting of a metal siphon being filled with gas); **Miller v Durban Corporation 1926 NPD 254** (collapse of platforms stacked against a wall); **Katz v Webb 1930 TPD 700** (bolting of a horse); **Mitchell v Maison Lisbon 1937 TPD 13** (plaintiff was burnt by defendant's permanent waving apparatus); **Salmons v Jacoby 1939 AD 589** (collision in the middle of the road); **Da Silva v Frack 1947 2 PH O 44 (W)** (collision on the defendant's incorrect side of the road); **SAR &H v General Motors (SA) Ltd 1949 1 PH J 3 (C)** (motorcar fell from a crane sling); **De Bruyn v Natal Oil Products Ltd 1952 1 PH J 1 (N)** (unexplained explosion); **Paola v Hughes (Pty) Ltd 1956 2 SA 587 (N)** (chandelier fell and broke while being lowered for purposes of cleaning); **Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd 1982 4 SA 890 (A)** (collision between ship and buoy whilst mooring); **Bayer South Africa (Pty) Ltd v Viljoen 1990 2 SA 647 (A)** (product liability); **Monteoli v Woolworths (Pty) Ltd 2000 4 SA 735 (W)** (spillage on floor causing injury); With regard to medical negligence see: **Mitchell v Dixon supra 579**; **Webb v Isaac 1915 ECLD 273**; **Coppen v Impey 1916 CPD 309**; **Van Wyk v Lewis supra 438**; **Allott v Patterson and Jackson 1936 SR 221**; **S v Kramer 1987 1 SA 887 (W)**; **Pringle v Administrator Transvaal supra 379**.

applied if the following requirements are adhered to:

- a) **The occurrence must be of such a nature that it does not ordinarily happen unless someone is negligent.**
- b) **The instrumentality must be within the exclusive control of the defendant**¹⁰.

2.3.2 NEGLIGENCE

In considering the nature of the occurrence giving rise to the application, it is important to note that not every occurrence that justifies an inference of negligence qualifies as or justifies a finding of *res ipsa loquitur*. Rumpff JA provides the example of a motor vehicle driving from its correct side of the road onto its incorrect side of the road and causing damage or injury as a result thereof. In this instance the occurrence itself without regard to any other evidence or explanation, is indicative of the driver of the vehicle's

¹⁰ Hoffmann and Zeffertt 551; Cooper 100; Schmidt and Rademeyer 163; Isaacs and Leveson *The Law of Collisions in South Africa* (1998) 175; **Mitchell v Maison Lisbon supra 13; Stacey v Kent 1995 3 SA 344 (E)**. The facts of the various authorities which are referred to infra are not set out in any detail for purposes of this discussion. It is endeavoured rather to expound the relevant principles as reflected and enunciated by the respective authorities.

negligence¹¹. Thus, the mere evidence of the detrimental occurrence and the fact that it was caused by an object under the exclusive control of the defendant constitutes a *prima facie* factual inference that the defendant has been negligent. The occurrence speaks for itself because it is more consistent with negligence on the part of the defendant than with any other possible

¹¹ **Groenewald v Conradie supra 187**. In his judgment Rumpff JA also approved of the formulation of the doctrine by Ian B Murray (Murray “*Res Ipsa Loquitur*” 1941 *SALJ* 8): “The true meaning of *res ipsa loquitur* is that the mere happening of an accident is in certain cases relevant to infer negligence, that is to say, that proof of the happening of the accident, without anything more, entitles the plaintiff to assert that he has put before the Court a piece of evidence of such a character that the Court would not, at the close of the plaintiff’s case (he having led no further evidence than proof of the accident), be justified in acceding to an application for absolution from the instance made by the defendant’s counsel. Whether the case is of this character or not depends upon the circumstances; there are many classes of occurrence where the mere happening of an accident is not relevant to infer negligence. If *res ipsa loquitur*, then the defendant may disprove negligence, either by leading evidence, or by closing his case and showing the Court by argument that it ought not in fact to infer negligence. If he disproves negligence he may obtain judgment in his favour, or the Court may grant absolution from the instance. Indeed, the fact that the court may very well, in a given case, refuse absolution at the close of plaintiff’s case because *res ipsa loquitur*, and nevertheless grant it at the close of defendant’s case, brings out the maxim in its true perspective. The *onus* remains throughout on the plaintiff; it does not shift to the Defendant”. See also **Mitchell v Maison Lisbon supra 17**: “...human experience shows us that in certain circumstances it is most improbable that the occurrence under investigation would have taken place without negligence”.

cause. The purpose of *res ipsa loquitur* is to alleviate the plaintiff's burden of proof in cases where direct proof is not available. The occurrence must therefore be of a kind which stands unexplained where the facts speak for themselves and from the facts known or established, the injury would not in the normal course of events have occurred without negligence. An occurrence justifying a finding of *res ipsa loquitur* will of necessity be one which is indicative of a high probability of negligence¹².

It has been emphasized that the doctrine can only be applied if the facts upon which the inference of negligence is drawn are derived from the occurrence itself¹³. In this regard the courts have held that the maxim cannot be invoked where the presence or absence of negligence depends on something relative and not absolute. The presence of negligence will depend on something relative if the court is required to consider all the surrounding circumstances

¹² Cooper supra 100.

¹³ See **Groenewald v Conradie supra 187** per Rumpff JA: "Ten slotte is dit wenslik om te beklemtoon dat die gebruik van die uitdrukking *res ipsa loquitur*, streng gesproke, alleen dan van pas is wanneer dit nodig is om enkel en alleen na die betrokke gebeurtenis te kyk sonder die hulp van enige ander verduidelikende getuienis. Alleen as die gebeurtenis op sigself en in sy eie lig beskou word, behoort die uitdrukking gebesig te word omdat anders die beperkte betekenis daarvan vertroebel mag word. 'n Mens sou dit so kon stel: *res ipsa loquitur ipsa dummodo una solaque sit*".

in the case ¹⁴. An inference of negligence is also only permissible while the cause remains unknown ¹⁵.

2.3.3 CONTROL OF THE INSTRUMENTALITY

The instrumentality which causes the injury must be within the exclusive control of the defendant or of someone for whom the responsibility or right

¹⁴ **Van Wyk v Lewis supra 438**. See also **Allott v Patterson and Jackson supra 226** per McIlwaine ACJ: “As laid down in *Van Wyk v Lewis* this maxim cannot be invoked where negligence or no negligence depends on something not absolute but relative. There is no room for it where, as in this case, all the surrounding circumstances are to be taken into consideration. The mere fact that injuries were sustained is not in itself *prima facie* proof of negligence.” and **Pringle v Administrator Transvaal supra 384** per Blum AJ: “The maxim could only be invoked where the negligence alleged depends on absolutes. In the instant case the initial problem was caused by the perforation of the superior vena cava. If the evidence showed that by the mere fact of such perforation negligence had to be present, then the maxim would have application. No such evidence, however, emerged before me, and since the question of whether negligence or not depends on all the surrounding circumstances, this makes the maxim totally inapplicable in cases such as the present”.

¹⁵ See **Administrator Natal v Stanley Motors 1960 1 SA 690 (A)** per Ogilvie Thompson JA at 700 (referring to an observation of Lord Porter in the English case of **Barkway** with approval): “If the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not”. See also Boberg “*Collapse of Approach to Bridge: Liability of Provincial Administration*” 1959 SALJ 129 and Boberg “*Liability for Collapse of Bridge*” 1960 SALJ 147.

to control exists¹⁶.

2.4 THE EFFECT OF THE APPLICATION OF THE DOCTRINE ON THE *ONUS* OF PROOF

2.4.1 INTRODUCTION

In order to establish the effect of the application of the doctrine of *res ipsa loquitur* on the *onus* of proof it is necessary first to have regard to the nature and role of the doctrine in the law of evidence.

2.4.2 *RES IPSA LOQUITUR* AND CIRCUMSTANTIAL EVIDENCE

Certain South African academic writers have argued that cases to which the doctrine of *res ipsa loquitur* apply, constitute nothing more than a particular species of circumstantial evidence where it is sought to prove negligence and the evidence of the occurrence itself provides its own circumstantial

¹⁶ **Scott v London and St Katherine Dock's Co supra 596; S v Kramer supra 895; Stacey v Kent supra 325**; Shane "*Res ipsa loquitur*" 1945 *SALJ* 289; Giesen 515; Strauss *Doctor, Patient and the Law* (1991) 264. Liability is usually established vicariously or by way of agency. In **S v Kramer supra 895** van der Merwe J (Vermooten AJ concurring) said the following

with regard to the element of control in a medical setting: “If a mishap should occur during the operation it is of importance to ascertain who was responsible for the mishap and to what extent any other member of the operating team can be held liable for the actions of that person...I am of the opinion that, in general, neither the surgeon nor the anaesthetist is liable for the other’s negligence. This general rule will, however, be subject to exceptions, for example, where the surgeon knew that the anaesthetist was incompetent or not in a fit condition to perform his duties”. He referred to the judgment in **Van Wyk supra 460** where Wessels JA *inter alia* with regard to the relationship between the surgeon and the nursing staff said that: “...We must therefore admit that in operations some teamwork, as it has been called by several witnesses, is essential. The work has become specialized so as to enable the surgeon to devote all his energy and attention to the highly skilled and difficult work of isolation, dissection and purification. To what extent a doctor should or should not rely upon the team-work of the hospital assistants depends entirely on the nature of the particular case”, and held in his opinion that the same relationship exists between surgeon and anaesthetist. He found that they are not agents of each other, that they are not employed and controlled by one another and that each one performs a specific specialized function as part of a team consisting of surgeon, anaesthetist and nursing staff. In **Helgesen v South African Medical and Dental Council 1962 1 SA 800 (NPD) 819** Williams JP found that in his view: “...there can in certain circumstances certainly be joint responsibility in law for carrying out an operation. The mere fact that someone assists in a limited technical sphere at an operation, such as the administration of an anaesthetic for instance, may not of itself make him responsible in any sense for the actual operation. But a doctor may very well be responsible for the performance of an operation and even be said to have been a partner or *particeps* in the performance of it even though he carries out no actual physical act or procedure forming an integral part of the procedure itself. In such an event he could be said jointly to perform the operation and to be jointly responsible for the fact that an operation was carried out”. See also Strauss and Strydom *Die Suid Afrikaanse Geneeskundige Reg* (1967) 281.

evidence as to the existence of the negligence in question ¹⁷.

¹⁷ In an article titled “*Once Again Res Ipsa Loquitur*” 1952 SALJ 250 CCJ opines as follows: “In a *res ipsa loquitur* case the practical ‘onus’ cast on the defendant is exactly the same as in any other cause where a *prima facie* case is made out by circumstantial evidence, i.e. at least to throw matters back into an even balance in a civil case, or, in a criminal case, to raise a ‘reasonable doubt’ as to guilt – the actual quantum of evidence which the defendant would have to adduce to rebut the *prima facie* case will of course always depend on the strength of the actual case made out against him. On this analysis, that *res ipsa loquitur* has no special significance apart from the ordinary weight to be attached to circumstantial evidence, all the theoretical difficulties in regard to the alleged doctrine fall away”. In a similar vein Hodson “*Res Ipsa loquitur*” 1945 SALJ 408 412ff submits that there is no need to have a special class of cases where the doctrine is applied when it can simply be said that the circumstantial evidence tendered by the plaintiff establishes a *prima facie* case which calls for a reply. Morkel “*Res Ipsa Loquitur – Bevraagteken*” 1974 *De Jure* 160 163 also, in referring to the cases of **S v Trickett 1973 3 SA 526 (T)** and **S v Fouché 1974 1 SA 96 (A)** as examples where the courts according to him came to the correct findings by applying the ordinary principles relating to circumstantial evidence without relying on the doctrine of *res ipsa loquitur*, comes to the same conclusion and says: “Sonder om te beweer dat die ‘leerstuk’ uit pas is met die algemene beginsels van ons straf- en bewysreg, word dit nietemin aan die hand gedoen dat, om onnodige argumente en verwarring te voorkom dit tyd geword het om die adagium uit ons regswoordeskat te verban. ’n Mens wonder of dit so lank sou gehou het as dit nie in Latyn was nie”. See also Boberg “*The Role of Res Ipsa Loquitur*” 1962 SALJ 258. Murray “*Res Ipsa Loquitur*” 1946 SALJ 80 (contra) opines that the *res* is a piece of real evidence and this method of proof is widely recognised in practice. He goes on to say the following: “Things cannot lie or be mistaken. It is this fact which distinguishes a *res ipsa loquitur* case from the ordinary so-called “*prima facie* case of negligence”, where the witnesses may err, and, therefore, I consider that it is distinctly disadvantageous to try and merge the principle of *res ipsa loquitur* into a principle of “*prima facie* case...” 1946 SALJ 80-81. See also Pauw “*Buys and Another v Lennox Residential Hotel 1978 (3) SA 1037 (K)*” 1978 TSAR 279 281-282.

Common to both *res ipsa loquitur* and circumstantial evidence is the possibility of judicial error, whereby the court may be mistaken in its reasoning¹⁸. In this regard it is important to distinguish between an inference on the one hand and conjecture or speculation on the other¹⁹.

To ensure that a court draws the correct inference from the proved facts two cardinal rules of logic should be utilised, firstly: that the inference must be consistent with all the proved facts and secondly that the proved facts should be such that they exclude every other reasonable inference which can be drawn. If other inferences can be drawn there should be doubt whether the

¹⁸ Cooper 482.

¹⁹ In the English case of **Caswell v Powell Duffryn Associated Collieries [1940] AC 152 169**, Lord Wright provides the following instructive exposition of an inference which is compatible with the approach adopted by the South African courts: "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive, proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture".

inference sought to be drawn is correct²⁰. The doctrine of *res ipsa loquitur* is regarded by South African courts as a type of inferential reasoning which does not depend upon any rule of law²¹. The following comments of Erasmus J in the recent case of **Macleod v Rens**²² are instructive:

“As a particular form of inferential reasoning, *res ipsa loquitur* requires careful handling. It is not a doctrine, as it is sometimes referred to. It propounds no principle and is therefore strictly speaking not even a maxim. What it does do is pithily state a method of reasoning for the particular circumstance where the only available evidence is that of the accident. It boils down to the notion that in a proper case it can be self-evident that the accident was caused by the negligence of the person in control of the object involved in the accident. As such it is not a magic formula. It does not permit the Court to side-step or gloss over a deficiency in the plaintiff’s evidence; it is no short cut to a finding of negligence: these are real dangers in the application

²⁰ Cooper 483; **R v De Blom 1939 AD 188 202-203**. Schmidt and Rademeyer 83 refer to Gerke, who draws a distinction between civil and criminal matters in this regard. According to Gerke “*A Logical-Philosophical Analysis of Certain Legal Concepts*” (unpublished doctoral thesis Unisa 1966) 167-169 the party bearing the *onus* in a civil case need only demonstrate that one proposition is more probable than another, whereas the exclusion of a reasonable alternative hypothesis is mandatory in a criminal trial.

²¹ Hoffmann and Zeffertt 552; Schmidt and Rademeyer 176; Schwikkard *et al Principles of Evidence* (1997) 381 describe a presumption of fact as follows: “The term ‘presumption of fact’ is really only another way of indicating that the specific circumstances of a case are such that inferential reasoning is permissible”.

²² **1997 3 SA 1039 (E) 1048**.

of the expression. It seems to tempt courts into speculation. Expressions such as ‘in ordinary human experience’, ‘common sense dictates’, and ‘obviously’, which are regularly employed in reasoning along the lines of the maxim, sometimes only serve to disguise conjecture. Moreover, there is a risk of false syllogism inherent in reasoning that, as the accident would ordinarily not have occurred without negligence on the part of the driver of the vehicle, the defendant, having been the driver, was therefor negligent. Finally, reasoning along the lines of *res ipsa loquitur* leads to the somewhat unsatisfactory finding that the defendant was negligent in some general or unspecific manner”.

In South Africa it is now settled law that the doctrine of *res ipsa loquitur* is regarded simply as a permissible factual inference which the court is at liberty but not compelled to draw ²³.

2.4.3 ONUS OF PROOF

Since its inception the effect of the invocation of the doctrine of *res ipsa*

²³ See **Athur v Bezuidenhout and Mieny 1962 2 SA 566 (A)** per Ogilvie Thompson JA at 574: “The maxim *res ipsa loquitur*, where applicable gives rise to an inference rather than to a presumption. Nor is the court, or jury, necessarily compelled to draw the inference”; See also: **Van Wyk v Lewis supra 445**; **Sardi v Standard and General Ins Co Ltd 1977 3 SA 776 (A) 780**; **Swart v De Beer 1989 3 SA 622 (E) 626**; **Monteoli v Woolworths (Pty) Ltd supra 737**. See also Van der Walt and Midgley *Delict in Joubert* (ed) *The Law of South Africa* vol 8 (1995) 124.

loquitur has been the subject of controversy ²⁴. It would seem that the controversy was compounded by a -

“continued blurring in judgments of the distinction between the different senses in which the word ‘onus’ is used, and also of the distinction between a rebuttable ‘presumption of law’ and a so-called presumption of fact” ²⁵.

South African case law is indicative of the approach that the application of the doctrine of *res ipsa loquitur* does not shift the onus of proof on the defendant and that the burden of proof remains throughout the case on the plaintiff.

In **Van Wyk v Lewis** ²⁶ Innes CJ held as follows in this regard:

“No doubt it is sometimes said that in cases where the maxim *applies* the happening of the occurrence is in itself *prima facie* evidence of negligence. If by that is meant that the burden of proof is automatically shifted from the plaintiff to the defendant I doubt the accuracy of the statement...For clearly in this

²⁴ Boberg 1962 *SALJ* 257 contextualises the controversy as follows: “Does it shift the onus of proof to the defendant, or does it merely cast upon him a tactical burden of adducing evidence? Is he required to prove his explanation on a balance of probabilities, or does it suffice for him merely to suggest a means whereby the plaintiff’s damage might have occurred without his negligence?”.

²⁵ CCJ 1952 *SALJ* 245.

²⁶ **supra** 445.

case there has been no shifting of the onus²⁷.

2.4.4 THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL

The application of the doctrine of *res ipsa loquitur* establishes a *prima facie* factual inference which does not shift the burden of disproving negligence but may call for some degree of proof in rebuttal of that inference. In **Naude v Transvaal Boot and Shoe Manufacturing Co**, the court found that where a plaintiff establishes a *prima facie* case the nature of the reply which is called for by the defendant to escape the inference of negligence, depends on the nature of the case and the relative ability of the parties to

²⁷ In **Mitchell v Dixon supra 525** Innes ACJ held that the plaintiff carried the *onus* throughout the trial. The majority of the court in **Hamilton v MacKinnon 1935 AD 114** found that the plaintiff cannot succeed in an action based on negligence unless he proves what the cause of the accident was. In **Naude v Transvaal Boot and Shoe Manufacturing Co 1938 AD 379** the court held that the inference created by the nature of the accident does not shift the burden of disproving negligence on the defendant but calls for some degree of proof in rebuttal of that inference. Similarly the court in **Athur v Bezuidenhout and Mieny supra 573** held that the *onus* resting on the plaintiff in cases of this nature never shifts. See also: **Sardi v Standard and General Ins Co Ltd supra 780 D**; **Osborne Panama SA v Shell and BP South African Petroleum Refineries (Pty) Ltd supra 897 H**; **Stacey v Kent supra 344**; **Monteoli v Woolworths (Pty) Ltd supra 738 A**.

contribute evidence on the issue ²⁸. It held further that where the nature of the occurrence itself creates a probability of negligence the defendant does not displace the *prima facie* case, merely by proving a reasonable possibility that the accident could have happened without negligence. In cases where the taking of a precaution by the defendant is the initial and the essential factor in the explanation of the occurrence and the explanation is accessible to the defendant and not to the plaintiff, the plaintiff's *prima facie* case is not displaced if the defendant's evidence goes no further than to show that the precaution may or may not have been taken. The defendant must produce evidence sufficient to displace the inference that the precaution was not taken ²⁹.

²⁸ **supra 392.**

²⁹ **supra 393 399.** In the same decision Stratford CJ, although concurring that the appeal should succeed sought to express his own opinion on the issue *inter alia* by stating as follows: "the answer, it seems to me, is simple and clear; he must produce evidence sufficient to destroy the probability of negligence presumed to be present prior to the testimony adduced by him. If he does that then – bearing in mind that the burden of proving his allegation is always on the plaintiff and never shifts – on the conclusion of the case the inference cannot be properly drawn. Put differently, his evidence must go to show a likelihood in some degree of the accident resulting from a cause other than his negligence. I disagree with the proposition that proof of a possibility (not a probability) is sufficient, for the possibility of inevitable accident (in the legal sense) always exists; it requires no proof, it can be imagined and proffered as an explanation". See also Murray 1941 *SALJ* 8ff.

Following its earlier trend the Appellate Division confirmed the approach that once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, he must adduce evidence to the contrary. Theories or hypothetical suggestions introduced by the defendant into evidence will not suffice. That, however, is not to say that an *onus* rests on the defendant to establish the correctness of his explanation on a balance of probabilities³⁰.

In the **Athur**-case the counsel representing the respondents invited the court to follow a number of decisions where the courts had divided the enquiry into two stages, namely whether the plaintiff had made out a *prima facie* case and had defendant met that case. The court held that in its opinion, it was neither necessary nor sound in principle to make such a division. It found that there should be only one enquiry namely: has the plaintiff, having regard to all the evidence in the case, discharged the *onus* of proving on a balance of probabilities, the negligence which he has averred against the defendant. How far the defendants had to go to destroy the inference was left

³⁰ **Athur v Bezuidenhout and Mieny** supra 575; **Bates and Lloyd Aviation v Aviation Insurance Co** 1985 3 SA 916 (A) 941 H-I. See also Milner “*Res Ipsa Loquitur: The Tilted Balance*” 1956 SALJ 325ff.

somewhat unclear by the court but it indicated that the defendant was not required to establish an explanation on a balance of probabilities ³¹.

In **Rankisson and Son v Springfield Omnibus Services** ³² the court held that the degree of persuasiveness required by the defendant will vary according to the general probability or improbability of his explanation. If his explanation reflects an occurrence which is regarded as rare and exceptional in the ordinary course of human experience, much more would be required of him by way of supporting facts than if he offered an explanation which can be regarded as an ordinary 'everyday' event, although in the latter instance, the court should guard against the possibility that such

³¹ Ogilvie Thompson JA (576) stated the following in this regard: "If, of course, the defendant succeeds in establishing his explanation on a balance of probabilities, then there exists a balance of probabilities against the plaintiff who, in such an event, obviously fails. But the evidence given in support of the defendant's explanation, although falling short of proof on a balance of probabilities, nevertheless forms part of the evidence in the case and has to be taken into consideration by the Court. Such evidence may – depending on its cogency and the particular facts of the case – suffice to rebut the inference of negligence arising from proof of the mere occurrence relied upon by the plaintiff. Before it gives judgment in favour of the plaintiff, the Court must be satisfied that, having regard to the evidence as a whole, the plaintiff has proved, on a balance of probabilities, his allegation of negligence against the defendant".

³² 1964 1 SA 609 (D) & (CLD).

explanation was tendered because of the very frequency of the occurrence which it sought to describe. In **Sardi v Standard and General Ins Co Ltd**³³ the court found that the defendant against whom an inference of negligence is sought, may tender evidence seeking to explain that the occurrence was unrelated to any negligence on his part. Probability and credibility are considerations which the court will employ to test the explanation. The court does not adopt a piecemeal approach of first drawing the inference of negligence from the occurrence itself, regarding it as a *prima facie* case and then decide whether this has been rebutted by the defendant's explanation. At the end of the case the court has to decide whether, on all the evidence, the probabilities and inferences, the plaintiff has discharged the *onus* of proof on the pleadings, on a preponderance of probability, as any court would do in any other case where negligence is at issue.

Mullins J, in **Swart v de Beer**³⁴, held in this regard that once the plaintiff has furnished proof of the occurrence from which an inference of negligence

³³ **supra 780.**

³⁴ **supra 622 626 G-H.**

can be drawn, the defendant runs the risk of judgment being granted against him unless he tells 'the remainder of the story'.

In **Stacey v Kent**³⁵ Kroon J enunciated the relevant principles succinctly:

“Once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary; he must tell the remainder of the story, or take the risk of judgment being given against him. How far the defendant’s evidence need go to displace the inference of negligence arising from proof of the occurrence depends on the facts of the particular case. Mere theories or hypothetical suggestions will not avail the defendant; his explanation must have some substantial foundation in fact and the evidence produced must be sufficient to destroy the probability of negligence inferred to be present prior to testimony adduced by him. There is, however, no *onus* on the defendant to establish the correctness of his explanation on a balance of probabilities. The enquiry at the conclusion of the case remains whether the plaintiff has, on a balance of probabilities, discharged the onus of establishing that the collision was caused by negligence attributable to the defendant. In that enquiry the explanation tendered by the defendant will be tested by considerations such as probability and credibility”.

Another factor which may influence the nature of the defendant’s evidence in rebuttal is the situation where a plaintiff is not in a position to produce evidence on a specific aspect whereas the relevant issue is peculiarly in the

³⁵ **supra 344 352**. See also: **Madyosi v SA Eagle Insurance Co Ltd 1989 3 SA 178 (C) 184**; **Macleod v Rens supra 1002**; **Monteoli v Woolworths (Pty) Ltd supra 740**; **Mostert v Cape Town City Council 2001 1 SA 105 (C) 120**.

knowledge of the defendant. In such circumstances less evidence is usually required from the plaintiff to establish a *prima facie* case and an evidential burden is cast on the defendant to show what steps were taken to comply with the standards to be expected although the *onus* still remains on the plaintiff³⁶.

Where a plaintiff sues multiple defendants justice requires that the case should only be decided after all the parties to the action have placed such evidence which they choose to lead before the court. Where there is therefore evidence at the close of plaintiff's case, upon which the court could hold either or any defendant liable, the court should not grant an application for absolution from the instance in favour of either or any defendant. A defendant who thereafter chooses not to tender any evidence in exculpation, runs the risk of judgment being granted against him³⁷.

³⁶ See for example: **Union Government (Minister of Railways) v Sykes 1913 AD 156 173-174; Ex parte Minister of Justice: in re R v Jacobson and Levy 1931 AD 466 473; Durban City Council v SA Board Mill Ltd 1961 3 SA 397 (A) 404-405; Marine and Trade Ins Co Ltd v Van der Schyff 1972 1 SA 26 (A) 37-38; Gericke v Sack 1978 1 SA 821 (A) 827; Macu v Du Toit 1983 4 SA 629 649-650; Monteoli v Woolworths (Pty) (Ltd) supra 742.**

³⁷ Cooper 122ff.

If the evidence against multiple defendants is inconclusive to the extent that a court is unable to decide on a balance of probabilities whether either or any defendant was negligent the only appropriate order would be one of absolution from the instance³⁸.

2.5 MEDICAL NEGLIGENCE CASES

2.5.1 INTRODUCTION

The application of the doctrine of *res ipsa loquitur* has achieved recognition as a particularly useful tool in medical malpractice cases in certain common law jurisdictions and is utilized to alleviate the plaintiff's burden of proof by relying on the medical accident itself to establish a *prima facie* factual inference of negligence, in the absence of an acceptable explanation by the defendant³⁹.

In South Africa, however, the law seems to have assumed a somewhat paternalistic and protective attitude towards the medical profession as is

³⁸ **Eversmeyer v Walker 1963 3 SA 384; Wakley-Smith v Santam 1975 1 PH J 7 (D); Rafferty v Das 1977 2 PH J 34 (T); Cooper 123.**

³⁹ Strauss 1967 *SALJ* 421ff; Claassen and Verschoor 28.

evidenced by most of the older reported authorities⁴⁰. The flagship of these older authorities is undoubtedly the case of **Van Wyk v Lewis**⁴¹ in which it was *inter alia* held that the doctrine of *res ipsa loquitur* cannot find application to medical malpractice cases. To date this Appellate Division judgment reigns supreme and unless challenged successfully, provides an insurmountable obstacle to plaintiffs who seek to rely on the doctrine in medical negligence cases⁴².

To be able to apply the doctrine to medical negligence cases would obviously be of considerable value and assistance to victims of medical accidents who are more often than not at an extreme disadvantage as a result of the fact that they are usually anaesthetised when the medical accident occurs. This factor together with the fact that one is dealing with an inexact science such as the practice of medicine, contribute to a plaintiff's very real

⁴⁰ See for example: **Mitchell v Dixon supra 519; Webb v Isaac supra 237; Coppen v Impey supra 309.**

⁴¹ **supra 438.**

⁴² Strauss 244 correctly states as follows: "This celebrated ruling by a three-judge appellate bench has functioned as protective shield as far as the doctor is concerned. It can indeed be described as the legal charter safeguarding the doctor against unduly stringent malpractice liability".

and cogent difficulty of establishing a *prima facie* case in order to avoid a successful application for absolution from the instance after closing his case.

Under these circumstances it is of extreme importance to subject this judgment to close scrutiny in order to evaluate whether the approach adopted by the court is in fact correct and in line with modern approaches adopted by other leading Common law jurisdictions. Due to the *stare decisis* rule there is obviously a dearth of reported authorities⁴³ after the **Van Wyk** judgment and consequently extensive reference to academic opinion on the subject is also required.

Generally speaking, the field of application of the doctrine to malpractice cases deals with the type of situation where the injurious result is in complete discord with the recognised therapeutic objective and technique of the operation or treatment involved⁴⁴.

⁴³ See for example: **Allott v Patterson and Jackson supra 221**; **Pringle v Administrator Transvaal supra 379** (discussed infra 54ff).

⁴⁴ Strauss 1967 *SALJ* 423.

Application of the doctrine should therefore not be regarded as a magic formula whereby the medical practitioner can be held liable for any unexpected or untoward result ⁴⁵. As Strauss correctly points out in this regard:

“In particular, courts are not entitled to draw an inference from the mere fact that a patient’s condition shows no improvement. The patient’s disease, after all, was not the making of the physician and negligence cannot be inferred merely from a condition which existed before the physician entered on the scene. Likewise, deterioration of a patient’s condition after medical treatment cannot in itself justify the inference of negligence. Many forms of medical treatment have an inherent element of risk. Even the occurrence of a very rare and unexpected complication, although not unknown to medical science or of death itself, does not per se afford evidence of negligence” ⁴⁶.

2.5.2 CASE LAW

The first reported medical case in which the doctrine of *res ipsa loquitur* was raised was the case of **Mitchell v Dixon** ⁴⁷ where the plaintiff instituted an

⁴⁵ Strauss and Strydom 1967 275; Strauss 1967 *SALJ* 419; Gordon Turner and Price *Medical Jurisprudence* (1953) 114; Strauss 290; Claassen and Verschoor 27; Carstens “*Die Toepassing van Res Ipsa Loquitur in Gevalle van Mediese Nalatigheid*” 1999 *De Jure* 19.

⁴⁶ Strauss 1967 *SALJ* 422.

⁴⁷ **supra** 525.

action for damages against the defendant who, while acting as an assistant to another medical practitioner was called in to attend to the plaintiff. Both medical practitioners diagnosed that he was suffering from a pneumo-thorax and the defendant proceeded to insert a syringe fitted with a steel needle into the plaintiff's back in order to explore the chest cavity and give relief. Unfortunately the needle broke off in the plaintiff's back and the defendants proceeded to make an incision to find the needle. Although they did not find the needle their evidence was that there was a marked escape of air from the incision proving the presence of a pneumo-thorax.

The plaintiff alleged that the defendant negligently advised and performed the operation, as a result of which the needle broke and was left in the plaintiff's body. The jury returned a general verdict in favour of the plaintiff and awarded damages in the amount of 100 pounds in the Durban Circuit Local Division. On appeal, Innes ACJ held that there was not sufficient evidence to justify reasonable men in finding that the defendants had been guilty of negligence in any of the respects relied upon by the plaintiff and consequently reversed the judgment of the court *a quo*.

The court also found that the mere fact that the accident occurred was not in itself *prima facie* evidence of negligence because the needle might have been broken by causes beyond the control of the defendants such as the movement of the plaintiff. Under the circumstances the maxim of *res ipsa loquitur* could not find application and the plaintiff was bound to establish negligence, which, the court found, he failed to do ⁴⁸.

A similar approach was followed in **Webb v Isaac** ⁴⁹ where the plaintiff claimed 1000 pounds as damages from the defendant, Dr Isaac. The plaintiff alleged that Dr Isaac was negligent in the treatment of his leg after it was severely injured by a beam which fell on it. He further averred that the defendant was also negligent in refusing to pay him a return visit when called upon to do so. On the strength of the medical evidence tendered at the trial Graham JP (Sampson J concurring) held that the shortening of plaintiff's leg was not caused by any negligence of the defendant. On the second allegation of negligence the defendant denied that he had been

⁴⁸ **supra** 525. See also: Strauss and Strydom 274-280; Gordon Turner and Price 117; Strauss 265; Claassen and Verschoor 30.

⁴⁹ **supra** 267.

requested by the plaintiff to visit him again and the court, after having regard to the probabilities found in favour of Dr Isaacs. With regard to the *onus* of proof the court referred with approval to the judgment in **Mitchell v Dixon** and held that the burden of proving that the injury of which the plaintiff complained was occasioned by the negligence of the defendant rested throughout the case on the plaintiff. The court further found that the mere fact that an accident occurred was not in itself proof of negligence and the doctrine of *res ipsa loquitur* did not apply.

In **Coppen v Impey**⁵⁰ the plaintiff sought to recover damages for an injury to her hand which she alleged was caused by an X-ray burn as a result of negligence or lack of skill by the defendant who was a medical practitioner. In this instance the court followed the initial approach adopted by the Appellate Division in **Mitchell v Dixon** with regard to medical negligence. The court held that the plaintiff had failed to show that the defendant had been negligent or unskillful in his application of the X-ray treatment either in frequency or duration of such application. Without referring to the doctrine of *res ipsa loquitur* directly the Kotze J found that the *onus* was on

⁵⁰ **supra 309.**

the plaintiff to prove lack of skill on the part of the defendant. He found that such lack of skill could only be inferred if satisfactory evidence was tendered in this regard.

It is clear from these earlier reported judgments that the courts were not prepared to apply the doctrine to medical negligence cases. The doctrine was however, not considered in any great detail. The requirements for the application of the doctrine, the nature of the doctrine and its effect on the *onus* of proof received scant attention while the nature of the defendant's explanation in reply was not considered at all. In view of the above it is submitted that these judgments should not, strictly speaking, represent acceptable authority for the proposition that the doctrine cannot find application to medical negligence cases in South Africa.

The first reported case dealing with the application of the doctrine to medical negligence cases in much more detail was the judgment in **Van Wyk v Lewis**⁵¹ which was initially adjudicated upon by Van der Riet J and taken on appeal by the plaintiff to the Appellate Division in Bloemfontein.

⁵¹ 1923 E 37.

The plaintiff in this action alleged *inter alia* the following in her declaration:

“...5. On the same day in the Frontier Hospital, Queenstown, Defendant performed a Surgical Operation on Plaintiff. The exact nature of the said operation is to Plaintiff unknown.

6. After Defendant had finished the said operation her (sic) carelessly and negligently left a ‘swab’ or serviette made of butter-muslin inside Plaintiff’s body.

7. On diverse occasions subsequent to the said operation Defendant examined Plaintiff but through his negligence and lack of proper skill he failed to detect and remove the said ‘swab’ or serviette from her body.

8. The said ‘swab’ or serviette remained inside the Plaintiff until about the 15 February 1923, and owing to its presence in her, Plaintiff has been severely injured in her health, has suffered great bodily pain and mental anxiety and has been put to considerable expense...”⁵².

Defendant in his amended plea took issue with these allegations as follows:

“4. Paragraph 6 is denied. Defendant denies that any ‘swab’ (or serviette) was in fact left inside Plaintiff’s body at all.

⁵² 4-5 of the record of proceedings in the court *a quo*. A copy of the record of proceedings was obtained from the archives of the Supreme Court of Appeal in Bloemfontein. The particulars of claim as set out in the plaintiff’s declaration and the defendant’s amended plea are quoted *verbatim*.

5. Alternatively, should this Honourable Court find that such a 'swab' was in fact left inside Plaintiff's body, Defendant says that he was and is in no way liable therefor. Counting and checking the swabs used in an operation at any hospital is by custom, long established, reasonable uniformly observed and certain, the duty of the theatre Sister in the employ of the said Hospital Board and is not the duty of the Surgeon performing the said operation. The said Surgeon only removes such swabs as he discovers by the use of all skill and care if after he has so removed the swabs the Theatre Sister finds that the number so removed does not tally with the number originally used, it is her duty immediately to inform the said Surgeon who thereupon makes further search. At the said operation the said Hospital Board duly provided the said Theatre Sister (Defendant having no control over her appointment or dismissal) and Defendant at the conclusion of the said operation removed all such swabs as he discovered by the use of all due skill and care. At no time did the said Theatre Sister intimate to him that a swab was missing. If there was any negligence in connection with the said swab, such negligence was the negligence of the said Theatre Sister, and Defendant was and is in no way liable therefor.

As a further alternative in the event of this Honourable Court finding that a swab was left inside Plaintiff's body after the operation, and that the Defendant is in law responsible for the acts of the said Theatre Sister in and about the operation, Defendant specially pleads that the fact of the swab having been left inside Plaintiff's body was due to misadventure without any negligence on the part of the defendant personally or of the said Theatre Sister, and the defendant is in no way legally liable therefore"⁵³.

⁵³ 9-10 of the record of proceedings in the court *a quo*.

The plaintiff presented her case by leading her own evidence as well as eight other witnesses, some of whom were recalled. It should also be noted that the evidence of various prominent medical experts was taken on commission in Cape Town and formed part of the proceedings. Apart from the fact that Van der Riet J found Gwendolene van Wyk to be a truthful witness⁵⁴ it is also clear from the record that she was able to establish *prima facie* proof of negligence at the close of her case without the necessity of having to rely on the doctrine of *res ipsa loquitur*. The record also shows that the defendant did not apply for absolution from the instance at that stage of the proceedings, inviting the assumption that he did not dispute that she had established a *prima facie* case.

Extensive evidence was led at the trial as to the risks involved of swabs being retained in the body of the patient post-operatively and the methods utilized to combat what was commonly regarded as the ‘bugbear’ of abdominal surgery. Despite these precautions the evidence of the medical experts were indicative of the fact that swabs were still being left behind in the bodies of patients by surgeons who were well known to be careful and

⁵⁴ 1923 supra 46.

skillful, the reason being that no system had at that stage been developed which would eliminate the element of human fallibility⁵⁵.

According to the judgment Mr Pienaar (plaintiff's counsel) urged Van der Riet J in argument to find that because Dr Lewis had admitted that he personally placed every swab in the plaintiff's body, the *onus* was cast on him to establish that there had been no negligence on his part and he further contended that if Dr Lewis failed to establish the custom specially pleaded by him the court should find for the plaintiff⁵⁶.

⁵⁵ 1923 *supra* 47.

⁵⁶ Presumably this unfortunate state of affairs inspired Van der Riet J to find that: "While, therefore, the leaving of a swab may be prima facie evidence of negligence on the part of those taking part in the operation I do not think that it could be said that this justifies the contention that it is a matter of *res ipsa loquitur*, that a finding that a swab has been left behind indicates negligence on the part of the operating surgeon. I am not prepared to state to what extent as a general rule negligence is to be presumed for it seems to me that this question depends on the special circumstances of the operation, for the degree of care which the surgeon can devote to this detail of detecting the swabs must largely depend upon the nature of the operation and the expedition which had to be used. For example, to take an extreme case, where it is a matter of life and death to finish the operation at once it is obvious that it may be necessary to close up without much regard to the risk of leaving the swab behind, and this may be of minor importance with the risk of any delay" (304 of the record of proceedings in the court *a quo*).

The evidence of Dr Lewis relating to the swab reads *inter alia* as follows:

“It was very much against her interests that the surgeon operating should have his attention distracted to count swabs. It would be impossible to count them after wards (sic) because he would have to pick up any swabs which he had thrown on the floor and it would mean that he would have to re-sterilize (sic) before stitching her up and that would not be in the interests of the patient. It would mean a delay; a considerable delay. In such an operation delay would probably be fatal...On this occasion I did everything to remove all the swabs I could see and feel. I cannot remember on this particular occasion if I asked the nurse about the swabs or not. She assured me that everything was all right – she certainly did not tell me that there was anything wrong or I should have made a further search. It is not in the interests of the patient if the surgeon is not told by the nurse that something goes wrong to grope and make a search; it is a wrong proceeding especially in a septic operation and it would be almost criminal. I was given no warning whatever that anything was wrong before I sewed up. It is her duty to give me such warning immediately. Then I proceed to sew the patient up. The swabs are taken as Sister Ware says after the operation after the patient is sewn up and that was her practice. I was not told after the patient was sewn up anything was wrong at all. Had that happened I should hand (sic) had to open the patient again at the first opportunity”⁵⁷.

Van der Riet J in his judgment found firstly, that a swab was indeed retained

⁵⁷ At 104-106 of the record of proceedings in the court *a quo*.

inside the plaintiff's body ⁵⁸. He further found that the defendant in operating on the plaintiff adopted the standard system in use at the hospital at the time by using small swabs for external use only and large swabs for internal use with tapes and forceps attached. This system was a well-recognised one, used by skillful and careful surgeons. He also held that the defendant made a careful search and was undoubtedly under the impression that he had removed all the swabs which he had placed in the body of the plaintiff before he stitched her up ⁵⁹.

In conclusion he found that Sister Ware did not act as an agent or servant of Dr Lewis and that he could therefore not be held liable for any failure on her part nor could he be regarded as a joint tortfeasor with Sister Ware. Due to

⁵⁸ At 302 of the record of the proceedings in the court *a quo*.

⁵⁹ At 312 he held that: "After a careful consideration, therefore, I have come to the conclusion that, having regard to the nature of the operation, there is, in my opinion, nothing to establish either that the defendant was negligent or incompetent in not discovering from his own search that a swab had been left behind, or that he acted improperly in relying upon the check which under the system adopted by him was to be made by the theatre sister, or in sewing up the plaintiff in the absence of any intimation from the theatre sister that there was a missing swab".

the fact that Dr Lewis was not found to be personally negligent or liable for any failure of care by Sister Ware the court found it unnecessary to discuss whether Sister Ware was indeed negligent or whether her failure was due to misadventure specially pleaded. Judgment was accordingly granted in favour of the defendant.

Mrs Lewis appealed to the Appellate Division and the appeal was heard by Innes CJ, Wessels JA and Kotze JA. Although all three judges of appeal concurred that the appeal should be dismissed, Kotze JA dissented with regard to the applicability of the doctrine of *res ipsa loquitur* to cases of this nature.

It is not clear from the judgment of Innes CJ whether he thought that there was room for the application of the doctrine in this case but it does however seem that his judgment is indicative of a reluctance to apply it. He initially addressed the question of *onus* and correctly indicated that the plaintiff must establish negligence and if at the conclusion of the case the evidence is

evenly balanced he cannot claim a verdict ⁶⁰.

⁶⁰ See at 444ff: “The question of *onus* is of capital importance. The general rule is that he who asserts must prove. A plaintiff therefore who relies on negligence must establish it. If at the conclusion of the case the evidence is evenly balanced, he cannot claim a verdict; for he will not have discharged the *onus* resting upon him. But it is argued that the mere fact that a swab was sewn up in the appellant’s body is *prima facie* evidence of negligence which shifts the *onus* so as to throw upon the respondent the burden of rebutting the presumption raised – a difficult task in view of the lapse of time between operation and trial. The maxim *res ipsa loquitur* is invoked in support of this contention. Now that maxim simply means what it says—that in certain circumstances the thing – that is the occurrence – speaks for itself. It is frequently employed in English cases where there is no direct evidence of negligence. The question then arises whether the nature of the occurrence is such that the jury or the court would be justified in inferring negligence from the mere fact that the accident happened...It is really a question of inference. No doubt it is sometimes said that in cases where the maxim applies the happening of the occurrence is in itself *prima facie* evidence of negligence. If by that is meant that the burden of proof is automatically shifted from the plaintiff to the defendant then I doubt the accuracy of the statement...For clearly in the present case there has been no shifting of *onus*. The plaintiff alleged a lack of reasonable care and skill, and the correctness or otherwise of that allegation can only be determined on a consideration of all the facts; there is no absolute test; it depends upon the circumstances. The nature of the occurrence is an important element but it must be considered along with the other evidence in the case. Indeed it is impossible to appreciate the position, and to visualize, even imperfectly, the circumstances attending an abdominal operation of this nature without studying the mass of medical evidence placed before the Court. In my opinion the *onus* of establishing negligence rested throughout this case on the plaintiff ”.

Wessels JA, however, explicitly rejected the application of the doctrine as follows:

“The mere fact that a swab is left in a patient is not conclusive of negligence. Cases may be conceived where it is better for the patient, in case of doubt, to leave the swab in rather than to waste time in accurately exploring whether it is there or not, as for instance where a nurse has a doubt but the doctor after search can find no swab, and it becomes patent that if the patient is not instantly sewn up and removed from the operating table he will assuredly die. In such a case there is no advantage to the patient to make sure that the swab is not there if during the time expended in exploration the patient dies. Hence it seems to me that the maxim *res ipsa loquitur* has no application in cases of this kind. There is no doubt that often what the decision in a case ought to be at a particular period of the trial sways from side to side: if at any one moment the decision had to be given upon the evidence led it would have to be in favour of the plaintiff though at a later stage it would be in favour of the defendant, but this does not mean that the plaintiff can stop when he has brought some evidence from which negligence should be inferred and require the defendant to proceed until it has again swayed in his favour...The *onus* therefore of proving negligence in a case of this kind is on the plaintiff from the beginning of the trial to the very end”⁶¹.

Kotze JA dissenting in part was of the opinion that the placing of a foreign object in the body of a patient and leaving it there when stitching up the wound establishes a case of negligence unless satisfactorily explained.

⁶¹ Van Wyk v Lewis supra 464.

In this regard he said:

“It is no doubt true that negligence may be manifested in many and various ways, and in complicated instances the difficulties usually are in respect of the *onus probandi*. Not infrequently a plaintiff may produce evidence of certain facts which, unless rebutted, reasonably if not necessarily indicate negligence, and in such cases the maxim of *res ipsa loquitur* is often held to apply”⁶².

He however found on the particular circumstances of the case that the leaving of the swab in the body of the patient should not be regarded as negligence on the part of Dr Lewis. After the **Van Wyk** judgment the application of the doctrine was also considered in **Allott v Patterson and Jackson**⁶³ where the plaintiff instituted an action against a dentist and a medical practitioner after sustaining a severe injury to his right arm and shoulder during a teeth extraction. The defendants both denied liability. The plaintiff sustained the injuries when he struggled under the influence of the anaesthetic and had to be restrained by the defendants. The plaintiff *inter alia* alleged that an inadequate anaesthetic was used,

⁶² **Van Wyk v Lewis supra 452**. See also Neethling, Potgieter and Visser *Case Book on the Law of Delict* (1994) 210ff. The majority judgment is also subjected to a comprehensive critical analysis *infra* at 65.

⁶³ **supra 221**.

that no effective apparatus was used for the control of the plaintiff while recovering from the anaesthetic and that the second defendant (who administered the anaesthetic) was lacking in skill and care by leaving a space at the plaintiff's nose whereby the intensity of the anaesthetic was lessened and through lack in care, skill and foresight in manipulating and by rough and unskillful handling of the plaintiff he was injured whilst under the anaesthetic.

The court per McIlwaine ACJ found that the defendants were not negligent as alleged and with regard to the doctrine of *res ipsa loquitur* referred with approval to the judgment in **Van Wyk v Lewis** to the effect that the doctrine could not find application where negligence or no negligence depends on something relative and not absolute as in this case. He held that the mere fact that injuries were sustained was not *prima facie* proof of negligence. The burden of proof remained throughout the trial on the plaintiff and as the court found that the plaintiff had failed to discharge the burden judgment was granted in favour of the defendants with costs. Strauss and Strydom opine that the doctrine of *res ipsa loquitur* should have been made applicable to this case. In this regard they say:

“Steunende op *Van Wyk v Lewis*, verwerp die hof *res ipsa loquitur* op grond daarvan dat “this maxim cannot be invoked where negligence or no negligence depends on *something not absolute but relative*”. Wat die gekursifeerde sinsnede alles inhou, is nie vir ons duidelik nie, maar die resultaat waartoe in hierdie saak gekom is, is dat *res ipsa loquitur* as ’n praktiese beginsel volslae kragteloos gemaak is. Dit is voorts ’n onbillike resultaat dat van die pasient wat in droomland was, verwag moes word om aan die hof te verduidelik wat die handelswyse van die tandarts was wat tot sy letsel aanleiding gegee het”⁶⁴.

The only other reported judgment on the application of the doctrine is the more recent case of **Pringle v Administrator Natal**⁶⁵ where a medianoscopy was performed on the plaintiff to have a small growth removed from her chest. During the procedure the plaintiff’s superior *vena cava* was torn resulting in ‘torrential’ bleeding, which in turn had permanent damage to her brain as a consequence. The plaintiff *inter alia* alleged that the perforation of her *vena cava* and its consequences were the result of negligence on the part of the surgeon, alternatively, that the medianoscopy was contra indicated and an inappropriate procedure under the circumstances, the performance of which constituted a breach of the surgeon’s duty of care.

⁶⁴ Strauss and Strydom 280.

⁶⁵ **supra 380**. See also Neethling Potgieter and Scott 207ff.

In this instance the court held that the *onus* of proving negligence remained throughout the case on the plaintiff and applied the test for negligence as set out in **Van Wyk v Lewis** to the effect that the medical practitioner had to employ reasonable care and skill and that such care and skill were measured by having regard to the ‘general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which the defendant belongs. Although the court held that the plaintiff failed to prove the alternative allegation that the procedure was incorrect and inappropriate it found that the surgeon had failed to apply the requisite degree of skill and diligence during the course of the operation by using excessive force to excise the growth.

With regard to the possible application of the doctrine of *res ipsa loquitur* to the facts of this case Blum AJ found that the maxim could only be applied where the negligence alleged depended on absolutes. In *casu* she found that the initial complication was caused by the perforation of the superior vena cava. If the evidence showed that by the mere fact of such perforation negligence had to be present the maxim would have applied. As no such

evidence was placed before the court and since the question of negligence depended on the surrounding circumstances of the case the maxim was held by her to be totally inapplicable to this case ⁶⁶.

From this judgment it can be concluded that the courts have not closed the door on the possible application of the maxim to medical negligence cases subject thereto that it can only be applied if the alleged negligence is derived from something absolute and the occurrence could not reasonably have taken place without negligence. If regard must be had to the

⁶⁶ At 384. (At 394 F of the judgment Blum AJ referred to the minority judgment of Kotze JA in **Van Wyk v Lewis** with what seems to be some approval). See however **State v Kramer supra 887**, where the court referred to **Webb v Isaac** with approval, thereby endorsing the majority approach in **Van Wyk v Lewis**. See also Hebblethwaite "*Mishap or Malpractice?: Liability in Delict for Medical Accidents*" 1991 *SALJ* 38 who in discussing the effect of the **Pringle**-judgment opines that: "It may well be argued that it is high time doctors were held accountable, and the tide turned against judgments favouring the medical profession; however, the **Pringle**-judgment is not, it is submitted, an appropriate judgment to herald a change of judicial attitude in medical malpractice litigation in South Africa. Surgery is a dangerous undertaking, and there is always an element of risk on the part of the patient. However, to enhance the legal risks assumed by the surgeon is undesirable to patient and practitioner alike".

surrounding circumstances to establish the presence or absence of negligence the doctrine does not find application.

2.5.3 LEGAL OPINION

2.5.3.1 INTRODUCTION

Academic writers are mostly *ad idem* that the application of the doctrine to medical negligence cases is limited ⁶⁷. The majority judgment in **Van Wyk**

⁶⁷ Strauss and Strydom 275 state as follows in this regard: “Wat geneeshere betref, moet daarteen gewaak word om uit die blote feit dat ’n kranke pasient se toestand nie verbeter nie – dws dat die genesing nie na wense is nie – ’n vermoede van nalatigheid te maak. Die ongesteldheid van die pasient is tog nie deur die geneesheer veroorsaak nie en dit sou onbillik wees om uit die toestand wat bestaan het, nog voordat die geneesheer op die toneel verskyn het, af te lei dat die laasgenoemde nalatig was...Selfs die feit dat die pasient se toestand na die geneeskundige ingryping ernstiger is as daarvoor, spreek natuurlik nie in sigself van nalatigheid aan die kant van die geneesheer nie. Baie vorme van behandeling of operasie gaan met besliste risiko’s gepaard. Om maar ’n enkele voorbeeld te noem: by elektriese skokbehandeling vanweë geestesongesteldhede is die gevaar van frakture aanwesig. Ook die feit dat ’n betreklik seldsame, maar aan medici bekende komplikasie intree, regverdig nie, in sigself ’n vermoede van nalatigheid nie”. See also: Athur “*Res Ipsa Loquitur as Applied in Dental Cases*” 1944 *SALJ* 217 220; Shane 1945 *SALJ* 289ff; Barlow “*Medical Negligence Resulting in Death*” 1948 *THRHR* 173 177; Gordon Price and Turner 114; Strauss 1967 420ff; Carstens 1999 *De Jure* 19 22.

v Lewis has understandably evoked both positive and negative responses from academic writers through the years and constitutes the focus of academic opinions on the application of the doctrine to medical negligence cases in South Africa.

2.5.3.2 THE MAJORITY JUDGMENT IN *VAN WYK v LEWIS*

Strauss and Strydom severely criticised the majority judgment by *inter alia* stating that the stitching of a foreign object in a patient should be regarded as such an unusual event and so contra the healing purpose and technique of an operation that the occurrence tells its own story and the medical practitioner should be called upon to explain what happened. They also submit that the doctrine should have been applied in the case of **Allot v Patterson and Jackson**⁶⁸.

Strauss is also of the opinion that the application of the doctrine to medical malpractice cases does not provide the complete solution to the plaintiff's

⁶⁸ Strauss and Strydom 279. See fn 43 supra.

problems. Before the maxim comes into operation there must be proof of an injurious result caused by the defendant and in many cases the injury and its cause may be so complicated that only a medical expert can explain them satisfactorily to the court. Under these circumstances it may be necessary for the plaintiff to fortify his version with expert medical evidence ⁶⁹. Strauss has in the meantime adopted a more careful and moderate approach and seems to hold the view that the majority judgment in **Van Wyk v Lewis** may after all have been correct ⁷⁰.

Shane states that there are certain circumstances which warrant the application of the doctrine for example where there manifest such obvious gross want of care and skill as to afford, of itself, an almost conclusive inference of negligence including instances where an injury is sustained to a healthy part of the body which was not supposed to be treated ⁷¹.

⁶⁹ Strauss 1967 *SALJ* 424.

⁷⁰ Strauss “*Geneesheer, Pasiënt en die Reg: ’n Delikate Driehoek*” 1987 *TSAR* 1.

⁷¹ Shane 279. It must be noted that Shane discusses the legal principles applicable to the United States of America and not South Africa.

Although Gordon, Price and Turner are of the opinion that the majority view expressed by the court in **Van Wyk v Lewis** seems to be the more satisfactory one they say that the moral appears to be that both sides should do their utmost to produce whatever expert evidence they can for the guidance of the court. If the experts disagree to such an extent that the court cannot decide on a balance of probabilities for the plaintiff he has failed to discharge the *onus* of establishing his case and must therefore lose⁷².

Barlow also submits that the doctrine must be applied to medical malpractice cases with extreme hesitation and only where the practitioner had absolute control over all the instruments which were used and there is no other explanation possible⁷³.

Claassen and Verschoor discuss the general principles with regard to the application of the maxim but they refrain from venturing an opinion as to

⁷² Gordon, Price and Turner 116.

⁷³ Barlow supra 173 177. See also Athur 1944 *SALJ* 220.

whether the maxim should be applied to medical negligence cases in South Africa ⁷⁴.

More recently however Carstens argues persuasively that the maxim should be applied in specific circumstances with regard to the proof of medical negligence. In this regard he *inter alia* suggests that the maxim does not really impact on the ordinary rules of evidence. Its application merely assists the plaintiff with regard to the *onus* which he or she bears. He states that the court should apply it with caution because of its influence on the *onus* of proof and that a plaintiff should specifically plead his or her reliance on the maxim in a civil action. In a criminal trial the state should indicate its intention to rely on the doctrine before the commencement of the trial ⁷⁵.

Apart from the fact that careful consideration should be afforded to the various elements of the delict or criminal offence, he further suggests that

⁷⁴ Claassen and Vershoor 28.

⁷⁵ Carstens 1999 *De Jure* 19.

a causal nexus must first be established between the occurrence and the injury before the maxim can be applied. The maxim should furthermore be applied when the plaintiff establishes a *prima facie* case based on so-called absolutes for example the amputation of the wrong limb or the retention of a surgical product post – operatively. He submits that considerations such as procedural equality and constitutional issues dictate that the maxim should be applied to cases of medical negligence ⁷⁶.

When a plaintiff establishes a *prima facie* case the defendant must give a reasonable explanation in exculpation. If the explanation is not accepted by the court the *prima facie* case becomes conclusive. He concludes by stating that the maxim should not be negated simply because it may inconvenience the medical practitioner in his defence ⁷⁷.

⁷⁶ Carstens 1999 *De Jure* 26 questions whether the defendant's knowledge ('binnekennis') of the circumstances should not influence the defendant's evidence at least to the extent that it places an *onus* on the defendant to establish an acceptable explanation. See also 305-306 *infra*.

⁷⁷ *Ibid* 28. See also Van den Heever "Res Ipsa Loquitur and Medical Accidents: Quo Vadis?" 1998 *De Rebus* 57.

2.5.3.3 CRITICAL ANALYSIS OF THE MAJORITY JUDGMENT

2.5.3.4 INTRODUCTION

Until such time as the Supreme Court of Appeal overturns the judgment in **Van Wyk v Lewis** plaintiffs in medical negligence cases will not be able to rely on the maxim to assist them with their evidential burden. It is, under the circumstances of extreme importance to consider whether the majority of the court was in fact correct in this regard.

2.5.3.5 THE EVIDENCE OF DR LEWIS

The evidence of Dr Lewis relating to the swab can be summarized as follows:

1. It was not the custom for the surgeon to search for swabs if the theatre sister did not alert him to the fact that a swab was missing intra-operatively.
-

2. In this particular case it was a 'septic' operation which dictated that it was in the best interests of the patient to complete the surgery expeditiously.
3. At no stage did the Sister indicate to Dr Lewis that anything was amiss and he proceeded to stitch up the patient.
4. Had he been informed that a swab was missing his evidence is quite clear that he would have had to open her up again and search for the swab at the earliest opportunity.
5. The only reasonable conclusion to be drawn from his evidence in this regard is that he would either immediately (ie intra-operatively) have searched for the missing swab, alternatively as soon as possible thereafter (ie when Mrs Van Wyk's physical condition was up to a further operation to detect the missing swab).

Dr Lewis's evidence with regard to the possible demise of the plaintiff if he had searched for the missing swab intra-operatively was tendered *ex post*

facto with the benefit of hindsight. He must have speculated to a fair degree with regard to this aspect of his evidence. It must also be emphasized that Dr Lewis was impervious of the fact that a swab was missing intra-operatively

⁷⁸.

If this was pointed out to him before the plaintiff had been stitched up he would in all probability have conducted the search for the missing swab immediately. The impression created from the judgment *a quo* as well as the majority judgment of the Court of Appeal is that surgeons are often confronted with a situation where they have to make a choice between searching for a missing swab thereby endangering the life of the patient or disregarding the swab and stitching up the patient to save his or her life. This is clearly not in accordance with the evidence and must be regarded as a fundamental misdirection. Contrary to both judgments referred to, the evidence indicates that it is at least as potentially fatal to leave a swab in patient's body as to conduct a search for the swab when the patient's intra-operative condition is gravely suspect.

⁷⁸ Dr Thomas urged the defendant to expedite the finishing of the operation.

The only reason why Dr Lewis did not conduct a search for the missing swab, at the time, was because of the fact that he was not informed that a swab was missing. It can readily be conceded that a patient's condition may be critical intra operatively and that under these circumstances it is not in the patient's best interests to search for swabs which may have been missed. The evidence is clear that a search will be conducted by the surgeon if his attention is drawn to the fact that a swab is missing. If the patient's condition is so critical intra-operatively that the search cannot be conducted right away, the search will be conducted as soon as possible thereafter depending on the patient's condition ⁷⁹.

2.5.3.6 CONCLUSION

The only logical conclusion which can be drawn in this regard is that the leaving of a foreign object such as a swab in a patient after an operation under circumstances where it was left undetected because of a miscount or

⁷⁹ 188 (Dr Drury tendered the following evidence: "If after that there was one short he (sic) would hunt for it without hesitation. I should open up again and lose another ten minutes to find it. It might be dangerous but it would be more dangerous to leave it there").

other form of neglect such as a departure from accepted practice should be regarded as *prima facie* negligence. The occurrence (ie the leaving of the swab in the patient) under these circumstances should not be regarded as something relative and not absolute and is not dependent on the surrounding circumstances. One of the reasons for this is simply the fact that if the operating team knew that a swab was missing they would either intra-operatively or very soon thereafter have conducted a search for the swab, thereby avoiding a situation where a patient develops a complication as a result of the retained surgical product.

The latest surgical products (such as swabs which are used in operations) are fitted with radio-opaque strips which facilitate post-operative radiological detection should they have gone missing intra-operatively.⁸⁰ The state of medical development as well as information technology have placed the medical layman in a position where it falls within his knowledge that the leaving behind of a surgical product such as a swab in a patient's body after an operation should not in the ordinary course of things occur without

⁸⁰ According to a brochure distributed by Smith and Nephew Limited, manufacturers of abdominal swabs, a green indicator thread has been heatwelded into the fibres of the inner layer of the swab so that it is X-ray detectable no matter how it is lying.

negligence. If regard is had (by way of analogy) to one of the classic examples where the maxim is applied to motor collision cases ie where evidence is tendered on behalf of plaintiff that the defendant's vehicle was driving onto the incorrect side of the road at an in opportune moment and such proof is regarded as *prima facie* proof of negligence⁸¹ there seems to be very little difference (if any) between the occurrence in both cases. In both instances the 'occurrence' creates a high probability of negligence.

In **Stacey v Kent**⁸² the Full Bench found that there are no considerations of policy which could establish an objection to an application of the *res ipsa loquitur* principle to a case where the evidence is that the defendant's vehicle collided with the plaintiff's vehicle on the latter's correct side of the road as a result of the former vehicle skidding onto that side of the road, notwithstanding statements in other reported cases to the effect that skidding does not necessarily constitute negligence. A plaintiff will, as a rule, not be in a position to give positive evidence that the skid was due to negligence of the defendant. The defendant, however, would ordinarily be in a position to

⁸¹ Cooper 103 and the authorities cited there. See also 327ff *infra*.

⁸² **Stacey v Kent** *supra* 344.

tender an explanation for the skid and, if he fails to do so, or to do so acceptably, an inference of negligence may be properly drawn ⁸³.

Similarly it can be argued that a plaintiff in a medical negligence action will usually not be in a position to testify positively that an object such as a swab which remained in his body post-operatively was as a result of negligence. The defendant would however be in a position to tender an explanation for the presence of the swab and if he fails to do so, or to do so acceptably, an inference of negligence may be properly drawn. In this instance as in the case of a motor vehicle skidding onto the incorrect side of the road the skidding or the post-operative presence of an object in the patient's body may not necessarily be occasioned as a result of negligence, but in the case of the skidding the maxim of *res ipsa loquitur* is applied notwithstanding this fact. There seems to be no compelling reason why the court has created an exception with regard to medical matters. If anything, the leaving of a foreign object in a patient's body is a much stronger indication of negligence ⁸³ **supra 357-358.**

than a motor vehicle skidding on to the incorrect side of the road. When regard is had to extreme and obvious cases where for example, the operation has been performed on the wrong limb, or on the wrong side of the body or where a prescription has been administered in the wrong dosage or the wrong drugs have been used or where test results are ascribed to the wrong patient,⁸⁴ it seems that there is no reason whatsoever why the maxim of *res ipsa loquitur* should not be applied.

In these instances it can hardly be argued that the alleged negligence depends on all the surrounding circumstances. It should however be borne in mind that in extreme cases such as an operation on the wrong limb the action seldom proceeds to trial as liability is usually admitted at an earlier stage of the proceedings. A plaintiff in such an instance will also usually find it quite simple to establish a *prima facie* case without the necessity of having to rely on the maxim at the close of his or her case.

⁸⁴ Carstens 1999 *De Jure* 26.

Although the South African courts have consistently followed the majority decision in **Van Wyk v Lewis** to the effect that the doctrine of *res ipsa loquitur* does not find application to medical negligence cases it is submitted that this judgment cannot be supported as a general rule and is in any event based on a fundamental misdirection as indicated above. Under the circumstances it is submitted that the judgment should not be regarded as unoverturnable authority for the proposition that the doctrine of *res ipsa loquitur* cannot be utilized to facilitate proof in certain limited but deserving medical negligence cases. The **Pringle**-case referred to above suggests that the doctrine could be introduced provided that the alleged negligence can be derived from a so-called absolute and does not depend on all the surrounding circumstances of the particular case⁸⁵.

⁸⁵ See p 38ff supra. In the well-known case of **Castell v De Greef 1994 4 SA 408 (C)** the Full Bench of the High Court adopted a patient-orientated approach in respect of the issue of informed consent. In this instance the court moved away from the traditional ‘medical paternalism’ approach and sought to bring the relevant legal principles in line with developments in other common law countries such as Canada, the United States of America and Australia. This more patient-orientated approach is to be welcomed and sets the table for other changes to the medical law, such as the application of the doctrine of *res ipsa loquitur* to limited but deserving medical accidents. See also: Van Oosten *Informed Consent in Medical Law* (1989); Van Oosten “*Castell v De Greef and the Doctrine of Informed Consent: Medical Paternalism Ousted in Favour of Patient Autonomy*” 1995 *De Jure* 164ff; Van den Heever “*The Patient’s Right to Know: Informed Consent in South African Medical Law*” 1995 *De Rebus* 53ff.

2.6 SYNOPSIS

2.6.1 INTRODUCTION

It is clear from the applicable case law and legal opinion with regard to the general application of the doctrine of *res ipsa loquitur* that certain well-defined principles have evolved with regard to the following issues:

- 1.1 the requirements for the application of the doctrine;**
- 1.2 the nature of the doctrine;**
- 1.3 the effect of the doctrine on the *onus* of proof; and**
- 1.4 the nature of the defendant's explanation in rebuttal.**

The relevant principles relating to each of these issues can be summarized as follows:

2.6.1.1 THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE

2.6.1.2 NEGLIGENCE

1. The occurrence must be one which in common experience does not ordinarily happen without negligence ⁸⁶.
2. An occurrence justifying a finding of *res ipsa loquitur* will be one which is indicative of a high probability of negligence ⁸⁷.
3. The doctrine can only find application if the facts upon which the inference is drawn are derived from the occurrence alone ⁸⁸.
4. The presence or absence of negligence must depend on a so-called absolute. As soon as the court is required to consider all the surrounding circumstances of the case the doctrine cannot find application ⁸⁹.
5. An inference of negligence is only permissible while the cause remains unknown ⁹⁰.

⁸⁶ Hoffmann and Zeffertt 551; Isaac and Leveson 175; Schmidt and Rademeyer 163; **Mitchell v Maison Lisbon supra 13; Stacey v Kent supra 344 352.**

⁸⁷ Cooper 100.

⁸⁸ **Groenewald v Conradie supra 187.**

⁸⁹ **Van Wyk v Lewis supra 438; Allott v Patterson and Jackson supra 226; Pringle v Administrator Transvaal supra 384.**

⁹⁰ **Administrator Natal v Stanley Motors supra 700.**

2.6.1.3 CONTROL

The instrumentality which causes the injury must be within the exclusive control of the defendant or of someone for whom the responsibility or right to control exists ⁹¹.

2.7 THE NATURE OF THE DOCTRINE

The maxim is simply regarded as a permissible factual inference which the court is at liberty – but not compelled to draw ⁹².

2.8 ONUS OF PROOF

The application of the doctrine does not shift the *onus* of proof on the defendant and the *onus* of proof remains throughout the case on the

⁹¹ **Scott v London and St Katherine Dock's Co supra 596; S v Kramer supra 895; Stacey v Kent supra 352.**

⁹² **Van Wyk v Lewis supra 445; Athur v Bezuidenhout and Mieny supra 575; Sardi v Standard and General Ins Co Ltd supra 780; Swart v De Beer supra 626; Monteoli v Woolworths (Pty) Ltd supra 737; Hoffmann and Zeffertt 552; Cooper 100; Schmidt and Rademeyer 176.**

plaintiff⁹³.

2.9 THE NATURE OF DEFENDANT'S EXPLANATION IN REBUTTAL

The *prima facie* factual inference which the application of the doctrine establishes may call for some degree of proof in rebuttal of that inference. In general, the explanation must comply with the following principles:

2.9.1 In cases where the taking of a precaution by the defendant is the initial and essential factor in the explanation of the occurrence and the explanation is accessible to the defendant and not the plaintiff, the defendant must produce evidence sufficient to displace the inference that the precaution was not taken. The nature of the

⁹³ **Mitchell v Dixon supra 519; Hamilton v MacInnon supra 114; Naude v Transvaal Boot and Shoe Manufacturing Co supra 379; Athur v Bezuidenhout and Mieny supra 566; Sardi v Standard and General Ins Co Ltd supra 780; Osborne Panama SA v Shell and BP South African Petroleum Refinery Pty Ltd supra 897; Stacey v Kent supra 344; Monteoli v Woolworths (Pty) Ltd supra 738.**

defendant's reply is therefore dependent on the relative ability of the parties to contribute evidence on the issue ⁹⁴.

2.9.2 The court's inquiry should not be two-staged ie whether firstly a *prima facie* case has been established and secondly whether the defendant has met such case but rather has the plaintiff, having regard to all the evidence tendered at the trial, discharged the *onus* of proving on a balance of probabilities, the negligence which he has averred against the defendant ⁹⁵.

2.9.3 The degree of persuasiveness required by the defendant will vary according to the general probability or improbability of the explanation. If the explanation is regarded as rare and exceptional in the ordinary course of human experience much more would be required by way of supporting facts. If the explanation is regarded

⁹⁴ **Athur v Bezuidenhout and Mieny supra 566; Bates and Lloyd Aviation v Aviation Ins. Co supra 941 H-I.**

⁹⁵ **Athur v Bezuidenhout and Mieny supra 576.**

as an ordinary everyday occurrence the court should always guard against the possibility that the explanation was tendered ‘glibly’ because of the very frequency of the occurrence which it seeks to describe ⁹⁶.

2.9.4 Where the defendant tenders evidence seeking to explain that the occurrence was unrelated to any negligence on his part probability and credibility are considerations which the court will employ to test the explanation ⁹⁷.

2.9.5 It has been held that the defendant runs the risk of judgment being granted against him unless he tells the remainder of the story although there is no *onus* on him to prove his explanation ⁹⁸.

⁹⁶ **Rankisson and Son v Springfield Omnibus Service supra 609.**

⁹⁷ **Sardi v Standard and General Insurance Co Ltd supra 776.**

⁹⁸ **Swart v De Beer supra 622; Stacey v Kent supra 352.**

2.10 CONCLUSION

Although South African courts have consistently followed the approach adopted by the majority in **Van Wyk v Lewis** it is submitted that this judgment can no longer be supported as a general blanket denial of the doctrine's application to medical negligence cases especially in view of the fact that it seems that the court based its most important finding in the judgment on a material misdirection in respect of the expert medical evidence tendered at the trial.

The paternalistic notion that all medical procedures fall outside the common knowledge or ordinary experience of the reasonable man is not only outdated but untenable. In certain instances of medical accidents it is totally unnecessary to have regard to the surrounding circumstances as the occurrence itself is almost conclusive proof of negligence for example the erroneous amputation of a healthy limb.

The **Pringle**-case provides authority for the proposition that the doctrine

could be introduced in a medical negligence action if the negligence can be derived from a so-called absolute without any dependence on the surrounding circumstances.

It seems that there is little justification for the fact that, in South Africa, the victim for example of an aircraft or motor accident should be able to make use of the doctrine to alleviate his or her evidential burden whereas the victim of a medical accident is constantly faced with an unjustified and inequitable denial of its application.