CHAPTER 3

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

3.1 INTRODUCTION

During 1809 Mr Christie was travelling by stage-coach to London when the axle-tree of the stage-coach snapped causing Mr Christie to be precipitated from the top of the stage-coach as a consequence whereof he sustained severe bruising which confined him to bed for several weeks. In a subsequent action against the proprietor of the stage-coach for negligence the plaintiff proved that the axle-tree broke at a place where there was a slight descent from the kennel crossing the road and that he was injured when as a result of the break, he fell off the stage-coach. He did not tender any further evidence and it was contended on behalf of the defendant that the plaintiff was bound to proceed with evidence either of the driver of the stage-coach being unskilful or of the coach being insufficient.

Sir James Mansfield CJ held that Mr Christie had made out a *prima facie* case by proving his going on the coach, the accident and the injury that he had suffered. He continued as follows:

> "It now lies on the other side to shew (sic), that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give? The passengers were probably all sailors like himself; - and how do they know whether the coach was well built, or whether the coachman drove skilfully? In many other cases of this sort, it must be equally impossible for the plaintiff to give the evidence required. But when the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He [81] has always the means to rebut this presumption, if it be unfounded; and it is now incumbent on the defendant to make out, that the damage in this case arose from what the law considers a mere
> accident" [1].

The defendant called several witnesses whose evidence was to the effect that the axle-tree had been examined a few days before it broke, without any flaw being discovered in it and that the coachman was a skilful driver who was driving at a moderate pace, in the usual track when the accident occurred. On this basis the jury found in favour of the defendant.

This case is indicative of circumstances where evidence of the alleged negligence of the defendant is not easily available to the plaintiff but is, or should be within the knowledge of the defendant. Thus when an accident of an unusual kind occurs which could not have happened unless the defendant was negligent and under these circumstances the cause of the accident is unknown, it would place an impossible burden on the plaintiff to establish

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[1] **Christie v Griggs (1809) 2 Camp 79**.

negligence on the defendant's part. By applying the doctrine of *res ipsa loquitur* the court is entitled to infer negligence against the defendant from the mere fact of the accident happening.

By invoking the doctrine the plaintiff successfully discharges his initial burden of proof by establishing a *prima facie* case of negligence against the defendant. The defendant is then required to tender an acceptable explanation to absolve himself from liability.

Res ipsa loquitur is therefore a rule of evidence which a court may utilize to enable justice to be done when the facts relating to causation and the standard of care exercised by the defendant are at the outset unknown to the plaintiff but are, or ought to be, within the knowledge of the defendant. In England the doctrine is considered to be no more than a convenient label to describe circumstances where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident in itself is considered to be sufficient to establish negligence in the absence of an acceptable explanation by the defendant [2].

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[2] **Lloyde v West Midlands Gas Board [1971] 2 All ER 1242 (CA)**.

In this chapter the origin and development of the doctrine are traced and the general requirements for the application of the doctrine, the nature and effect of the doctrine on the *onus* of proof and the nature of the defendant's explanation in rebuttal are expounded. A detailed discussion of the application of the doctrine to medical negligence cases in particular, with reference to case law and legal opinion follows thereafter and the chapter is concluded with a synopsis of the relevant legal principles both in general and in medical context.

3.2 THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN ENGLAND

The *fons et origo* [3] of the doctrine of *res ipsa loquitur* in English law seems to be the case of **Byrne v Boadle**,[4] where the plaintiff was injured by a

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[3] Lewis *"A Ramble with Res Ipsa Loquitur"* 1951 *CLJ* 74; Rogers *Winfield and Jolowicz On Tort* (1998) 187. Rogers suggests that the principle appears as early as 1809 in **Christie v Griggs supra 79**. See also **Skinner v LB & CS (1850) Ry 5 Ex 788** where two trains of which the same company was the owner, collided as a result of which the plaintiff was injured (being a passenger at the time). The court held that this was not a case where there was a collision between two vehicles belonging to different persons, where no negligence could be inferred against any party in the absence of evidence as to which of them was to blame. The court also found that whatever the probable cause of the accident was, there was no need for the plaintiff to specifically show what the negligence consisted of, as the trains belonged to the same company.

[4] **(1863) 2 H & C 722**.

falling barrel of flour from an upper floor of premises occupied by the defendant, while he was walking in the street. The plaintiff was not able totender evidence as to why or how the barrel fell or to verify that the defendants controlled the barrel. The defendants, after the close of the plaintiff's case objected to the fact that no evidence was tendered to either connect the defendant to the occurrence or to prove negligence. The defendants presented no evidence. In this instance the Court of Exchequer ruled in favour of the plaintiff, Pollock CB *inter alia* finding that there are certain cases of which it may be said *res ipsa loquitur*, where the courts have held that the mere fact of the accident is evidence of negligence, as for instance in the case of railway accidents [5].

The classic exposition of the doctrine was however laid down during 1865 by Erle CJ in **Scott v London and St Katherine's Dock Co** [6] in which he stated that where an instrumentality is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of events does not happen if those who have the management use

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[5] **supra 725**.

[6] **supra 601**. In this case, the plaintiff who was a customs officer at the time, was injured when some sugar bags fell on him while he was standing near the door of the defendant's warehouse. The defendants failed to tender evidence but the judge directed the jury to find a verdict for them on the ground of lack of evidence of negligence on their part. On appeal a new trial was directed based on the statement of Erle CJ referred to above.

proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from lack of care.

Some years later Cockburn CJ found *res ipsa loquitur* to be applicable to a case where a brick forming part of a railway bridge fell on the plaintiff who was passing along the highway. In this case the defendants also called no witnesses and based their defence on the fact that there was no evidence of negligence [7].

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[7] **Kearny v London & Brighton and South Coast Ry (1870) LR 5 (QB) 411**. Cockburn CJ delivered the following exposition of how the doctrine should be applied: "But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a proper state of repair, I think where an accident of this sort happens, the presumption is that it is not the frost of a single night, or many nights, that would cause such a change in the brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply…A very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of the brickwork. It might have been shown that many causes over which the defendants have no control, might cause this defect in so short a time that it could not reasonably be expected that they should have inspected it in the interval…Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from negligence of the defendants; and it was encumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts".

In more recent times there were two authorative expositions of the operation of the doctrine. Firstly, in **Henderson v Henry Jenkins and Sons** [8] Lord Pearson found that in an action for negligence the plaintiff must allege and has the burden of proving that the accident was caused by the negligence of the defendants. In giving judgment at the end of the trial the judge has to decide whether he is satisfied that the accident was caused by the defendants on a balance of probabilities. If he is not so satisfied the action fails. The formal burden of proof does not shift. If during the course of the trial, a set of facts is proved which raises a *prima facie* inference that the accident was caused by negligence on the part of the defendants, the plaintiff will succeed unless the defendants provide some answer in evidence which is adequate to displace the *prima facie* evidence. He concluded by stating that he entertained some doubt whether it was strictly correct to use the expression 'burden of proof' in such circumstances but that it was a familiar and convenient usage [9].

Secondly, in Lloyde v West Midlands Gas Board [10] Megaw LJ stated that

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[8] **[1970] AC 282**.
[9] **supra 301**.
[10] **supra 1242**.

res ipsa loquitur was no more than an exotic, although convenient phrase to describe a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. According to him it means that a plaintiff establishes negligence where it is not possible for him to prove exactly what the relevant act or omission was which set in motion the events leading to the accident but on the evidence as it stands at the relevant time, it is more probable that the effective cause of the accident was some act or omission of the defendant or someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care of the plaintiff's safety. He continued as follows:

> "I have used the words 'evidence as it stands at the relevant time'. I think that this can most conveniently be taken as being at the close of plaintiff's case. On the assumption that a submission of no case is then made, would, the evidence, as it then stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inference on a balance of probability is that that cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety? If so, *res ipsa loquitur*. If not, the plaintiff fails. Of course, if the defendant does not make a submission of no case, the question still falls to be tested by the same criterion, but the evidence for the defendant, given thereafter may rebut the inference. The *res*, which previously spoke for itself, may be silenced, or its voice may, on the whole of the evidence, become too weak or muted" [11].

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[11] **supra 1246**.

In **Ng Chun Pui v Lee Chuen Tat** [12] Lord Griffiths, in rendering the opinion of the Board of the Privy Council on this issue said, that in an appropriate case the plaintiff establishes a *prima facie* case by relying on the fact of the accident. If the defendant tenders no evidence there is no evidence to rebut the inference of negligence and the plaintiff will have proved his case.

If the defendant does adduce evidence, that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. He continued by stating that this may loosely be referred to as a burden on the defendant to show he was not negligent, but that it only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence in rebuttal of the *prima facie* case.

An analysis of cases relating to the application of the doctrine indicate that it is not possible to catalogue the type of cases where the doctrine is applied in England as every accident is in some respects unique and proof of facts by

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[12] **[1988] RTR 298 (PC)**.

facts is incapable of reduction to a formula [13]. The doctrine is however well settled in English authority and applied to a wide variety of circumstances [14].

3.3 REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE IN ENGLISH LAW

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[13] Lewis 1951 *CLJ* 77; Fleming *The Law of Torts* (1998) 353.

[14] See for example: **Dawson v Manchester, Sheffield and Lincolnshire Ry (1862) 5 LT 682** (railway carriage broke down); **Briggs v Oliver (1866) 4 H & C 403** (a packing case propped against a wall fell on a passerby in the street); **Chaprioniere v Mason (1905) 21 TLR 633** (stone in a bun which was baked by the defendant); **Newberry v Bristol Tramways Co (1912) 107 LT 801** (trolley arm of tram struck passenger on the head); **Reynolds v Boston Deep Fishing and Ice Co (1921) 38 TLR 22** (trawler fell over and was damaged on defendant's slipway); **Grant v Australian Knitting Mills [1936] AC 85** (woollen underware containing a chemical irritant); **Fosbrooke-Hobbes v Airwork Ltd [1937] 1 All ER 108 (KB)** (aircraft crashed shortly after take-off); **The Quercus [1943] 96** (moorings parted which allowed a boat to break adrift); **Pope v St Helen's Theatre [1946] All ER 440 (KB)** (fall of ceiling of theatre); **Cassidy v Ministry of Health supra 347** (child suffered cardiac arrest during surgery); **Colevilles v Devine [1969] 1 All ER 53 (HL)** (explosion causing plaintiff to jump off platform); **Bennett v Chemical Construction (GB) Ltd [1971] 3 All ER 823 (CA)** (heavy electrical control panel toppled over); **Ward v Tesco Stores [1976] 1 All ER 219 (CA)** (customer slipped on spilt joghurt); **Stafford v Conti Commodity Services Ltd [1981] I All ER 691 (QB)** (advice of broker on commodities market causing damages); **Boutcha v Swindon Health Authority [1996] 7 Med LR 62 (CC)** (hysterectomy causing injury to ureter).

3.3.1 INTRODUCTION

In English law there are three basic requirements which must be adhered to before the doctrine of *res ipsa loquituir* may be invoked namely:

a) The occurrence must be of such a nature that it does not ordinarily happen without negligence;

b) the instrumentality must be under the control of the defendant or of someone for whom the defendant is responsible; and

c) the actual cause of the accident must be unknown [15].

3.3.2 NEGLIGENCE

The accident must be one which would not in the normal course of events have occurred without negligence [16]. The question to be decided is whether the accident itself justifies the inference of negligence and in this regard

[15] Lewis 1951 *CLJ* 78; Lall *"A Glimpse of Res Ipsa Loquitur"* 1974 *NLJ* 216; Balkin and Davies *Law of Torts* (1991) 293-297; Baker *Tort* (1991) 201-203; Clerk and Lindsell *On Torts* (1995) 385-387; Rogers 189; Brazier *The Law of Torts* (1999) 259.

[16] **Scott v London and St Katherine's Docks Co supra 596**; **Saunders v Leeds Western Health Authority (1985) 129 SJ 255 (1986) PMILL Vol 1 No 10**; **Ratcliffe v Plymouth & Torbay HA supra 169**; Lall 1974 *NLJ* 217; Rogers 189ff; Brazier 259.

all the circumstances must be considered in the light of common experience and knowledge [17]. The application of the above principle in effect means that the presiding judge takes judicial notice of the common experience of mankind [18]. The plaintiff is also at liberty to call expert witnesses to testify that the accident would not have occurred without negligence in a further endeavour to avoid a situation where the plaintiff fails to establish the necessary proof because the judge lacks the experience to draw an appropriate inference [19].

3.3.3 MANAGEMENT AND CONTROL

The instrumentality causing the accident must be within the exclusive control of the defendant or of someone for whose actions the defendant is responsible [20]. An independent contractor employed by the defendant has

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[17] **Byrne v Boadle supra 722**; **Skinner v LB & SC Ry supra 787**; **Chaprioniere v Mason supra 633**; **Fosbrooke-Hobbes v Airwork Ltd supra 108**; **Grant v Australian Knitting Mills supra 85**; **Sochacki v SAS [1947] 1 All ER 344 (KB)**; **Fish v Kapur [1948] 2 All ER 176 (KB)**; **Mahon v Osborne supra 14**; **Cassidy v Ministry of Health supra 343**; **Roe v Ministry of Health supra 131**; **Bennett v Chemical Construction supra 1571**; **Stafford v Conti Commodity Services supra 691**.

[18] Rogers 189.

[19] Ibid 189.

[20] Lall 1974 *NLJ* 216; Rogers 189; Brazier 260.

control provided that the circumstances are such that the defendant will be liable for the independent contractor's negligence or the circumstances are such that he must supervise the contractor [21].

It is not necessary that all the events and circumstances surrounding the accident be under the defendant's control [22]. Where the circumstances leading up to the accident are under the control of others besides the defendant the mere occurrence is not sufficient evidence against the defendant [23].

Where the instrumentality is in the control of several employees of the same employer and the plaintiff cannot single out the particular employee who is in control, the principle can still be applied and invoked as to make the

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[21] **James v Dunlop [1931] 1 BMJ 730 (CA)**; **Morris v Winsbury-White supra 494**; **Walsh v Holst & Co Ltd [1958] 1 WLR 800**; **Kealy v Heard [1983] 1 All ER 873 (QB)**; Rogers 141.

[22] **Chaprioniere v Mason supra 633**; **McGowan v Stott (1930) 143 LT 217**; **Grant v Australian Knitting Mills supra 85**; **Moore v R Fox and Sons [1956] 1 (QB) 596**.

[23] **Easson v LNE Ry [1944] 2 All ER 425 (CA)**; **Morris v Winsbury-White supra 494**; **Lloyde v West Midlands Gas Board supra 1242**; **Duval v Anka Builders (1992) 28 NSWLR**; **Pritchard v Clwyd CC [1993] PIQR 21**.

employer vicariously liable [24].

3.3.4 ABSENCE OF EXPLANATION

If the causes of the accident are known the case ceases to be one where the facts speak for themselves and the plaintiff must establish that the defendant was negligent in relation to the cause [25]. A plaintiff who can only present a partial explanation of how an accident occurred is not precluded from relying on *res ipsa loquitur* for further inferences to advance his case [26].

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[24] **Mahon v Osborne supra 535**; **Voller v Portsmouth Corporation (1947) 203 LTJ 264**; **Cassidy v Ministry of Health supra 547**; **Clarke v Worboys [1952] The Times 18 March (CA)**; **Roe v Minister of Health supra 66 131**; **Bentley v Bristol and Weston Health Authority (No 2) [1991] 3 Med LR 1 (QB)**; **Bull v Devon Health Authority [1993] 4 Med LR 117 (CA)**; **Boutcha v Swindon Health Authority supra 22**; **Leckie v Brent and Harrow Health Authority [1982] 1 The Lancet 634 (QB)**; Balkin and Davies 299ff.

[25] **Flannery v Waterford and Limerick Rly Co (1877) 1 R CL 30**; **Milne v Townsend (1890) 19 R 830**; **McAthur v Dominion Cartridge Co [1905] AC 72 (PC)**; **Farrel v Limerick Corporation (1911) 45 ILT 169**; **Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392 (CA)**; **Bolton v Stone [1951] 1 All ER 1087 (HL)**; **Brophy v JC Bradfield and Co Ltd [1953] 3 All ER 286 (CA)**; **Hay v Grampian Health Board [1995] 6 Med LR 128 (SC)**; Baker *Tort* (1991) 201; Balkin and Davies 294; Rogers 190; Brazier 259.

[26] **Ballard v North British Ry Co (1923) SC (HC) 43**. See however Foster *"Res Ipsa Loquitur: The Defendant's Friend"* 1996 *SJ* 824: "The third criterion is of crucial importance, and is often forgotten. If there is evidence, however slight, as to how the occurrence took place, the plaintiff has to rest his case wholly on the evidence, and the maxim can never help him".

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

3.4.1 INTRODUCTION

The doctrine of *res ipsa loquitur* is considered to be a part of the law of evidence and as such it is necessary to have regard to the nature and role of the doctrine in the law of evidence in order to establish its effect on the *onus* of proof.

3.4.2 *RES IPSA LOQUITUR* AND CIRCUMSTANTIAL EVIDENCE

As a general rule of evidence the plaintiff bears the *onus* of proving on a balance of probabilities that the defendant has been negligent and that such negligence caused the injury or damage complained of [27]. The plaintiff may employ both direct or circumstantial evidence or a combination of such evidence to prove his or her case. In the case of direct evidence the plaintiff tenders evidence of specific acts of negligence. In the case of circumstantial evidence a fact is inferred from the facts which the plaintiff tenders as

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[27] Kiralfy *The Burden Of Proof* (1987) 80ff; Howard *et al Phipson On Evidence* (1990) 69ff; **Wilsher v Essex Area Health Authority [1988] 1 All ER 871 (HL)**. See also with regard to the burden of proof in general: Tapper *Cross On Evidence* (1990) 110ff; Cooper *et al Cases and Materials on Evidence* (1997) 93-98; Uglow *Evidence: Text and Materials* (1997) 700ff.

evidence [28]. In some instances, however, the mere fact that an accident has occurred raises an inference of negligence against the defendant. *Res ipsa loquitur* is considered to be no more than a convenient label to describe circumstances where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident in itself is considered to be sufficient to establish negligence in the absence of an acceptable explanation by the defendant [29].

Initially English courts in the face of severe criticism [30], elevated *res ipsa loquitur* to a principle of substantive law [31]. During the 1970's, however, a decisive swing was adopted by the English Court of Appeal towards the view that *res ipsa loquitur* is no more than a convenient phrase to describe

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[28] **Jones v GW Ry (1931) 144 TLR 39** per Lord MacMillan: "An inference is a deduction from the evidence, which, if it is a reasonable deduction, may have the validity of legal proof, as opposed to conjecture which, even though plausible, has no value, "for its essence is that it is a mere guess".
[29] Rogers 191.
[30] See for example **Ballard v North British Ry supra 53**; **Gahan, 1937 The Bell Yard No xx 28**; **Easson v LNE Ry supra 425**.
[31] **Moore v R Fox and Sons supra 596**.

the assessment of evidence in certain circumstances [32].

3.4.3 *ONUS* OF PROOF

There has, through the years, been much controversy concerning the precise procedural advantage that a plaintiff gains from the successful invocation of the maxim [33]. One of the conflicting views is that the successful invocation of the maxim raises a *prima facie* inference of negligence which requires the defendant to raise some reasonable explanation as to how the accident could have occurred without negligence on his or her part. In the absence of such

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[32] Brazier 262ff. **Lloyde v West Midlands Gas Board supra 1246**. In the much more recent case of **Ratcliffe v Plymouth & Torbay HA supra 174** Hobhouse LJ said as follows in this regard: "*Res ipsa loquitur* is no more than a convenient Latin phrase used to describe the proof of facts which are sufficient to support an inference that a defendant was negligent and therefore to establish a prima facie case against him…The burden of proving the negligence of the defendant remains throughout on the plaintiff. The burden is on the plaintiff at the start of the trial and absent an admission by the defendant is still upon the plaintiff at the conclusion of the trial. At the conclusion of the trial the judge has to decide whether upon all the evidence adduced at the trial he is satisfied upon the balance of probabilities that the defendant was negligent and that his negligence caused the plaintiff's injury. If he is so satisfied he gives judgment for the plaintiff: if not, he gives judgment for the defendant".

[33] **Moore v R Fox and Sons supra 596**; **Ward v Tesco Stores Ltd supra 810**; **Ng Chun Pui v Lee Chuen Tat supra 301**; **Ratcliffe v Plymouth and Torbay HA supra 161**; Hart and Honore *Causation in the Law* (1985) 421; Foster *"Res Ipsa Loquitur: Clearing Up the Confusion"* 1998 *SJ* 762.

explanation the *prima facie* case is established and the plaintiff should succeed. If the defendant does tender evidence in exculpation and such evidence is consistent with the absence of negligence on his part, the inference of negligence is rebutted and the plaintiff has to produce positive evidence that the defendant has acted without reasonable care [34].

On this basis the burden of proof does not shift to the defendant and if the probabilities are equally balanced after the evidence of the defendant the plaintiff's action is doomed to failure [35].

The alternative approach entails the reversal of the burden of proof which requires the defendant to establish that the accident was not caused by his negligence [36] In the case of **Ng Chun Pui v Lee Chuen Tat** [37] the Privy Council however found that the burden of proof does not shift to the

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[34] **Colevilles v Devine supra 479**; **Moore v Worthing District Health Authority [1992] 3 Med LR 431 434**.
[35] **Barkway v South Wales Transport supra 118**.
[36] **Moore v R Fox and Sons supra 596**; **Ward v Tesco Stores supra 810**. See also: Dugdale *et al Professional Negligence* (1989) 15.28; Jones 103; Jackson and Powell *Professional Negligence* (1992) 480; Rogers 192.
[37] **supra 298**.

defendant, but rests throughout the case on the plaintiff. With regard to the evidence adduced by the defendant it found that the burden which the defendant faces means that the defendant must produce evidence which is capable of rebutting the *prima facie* case established by the plaintiff. The defendant's position is therefore no different from a defendant who is faced with positive evidence adduced by the plaintiff and which has established a *prima facie* inference of negligence [38].

3.5 THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL

When the doctrine of *res ipsa loquitur* is applied against the defendant two issues arise. The first issue is a matter of law and involves the question as to whether the *res* which has been proven, establishes a *prima facie* case of negligence against the defendant. The second issue involves a factual question and entails an inquiry into the question as to whether the facts supporting the allegation of negligence should be held to have been proved.

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[38] **Ng Chun Pui v Lee Chuen Tat supra 301**.

In order to rebut the *prima facie* case of negligence the defendant may attempt to directly controvert the plaintiff's allegations of fact by proving that he took all reasonable care, leaving the court to infer that the occurrence causing the damage or injury to the plaintiff, was entirely due to misadventure or that it had some other cause for which the defendant is not responsible [39]. In this regard it has been held that it is not enough for the defendants merely to show that the accident could have happened without negligence on their part but also that they had taken all reasonable precautions to ensure that the accident did not happen [40].

Alternatively the defendant may tender direct evidence as to another cause which is inconsistent with negligence on his part [41].

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[39] Baker 204. See also **Delaney v Southmead HA supra 395** per Stuart-Smith LJ "…it is always open to a defendant to rebut a case of *res ipsa loquitur* either by giving an explanation of what happened which is inconsistent with negligence…or by showing that the defendant has exercised all reasonable care…".

[40] **Moore v R Fox and Sons supra 597**; **Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218 243**.

[41] **Ballard v North British Railways supra 45**; **Langham v Wellingborough School (1932) 101 LJKB 513**; **Ritchie v Chichester HA [1994] 5 Med LR 187** (**QB)**; **Hay v Grampian Health Board supra 128**; Percy *Charlesworth and Percy On Negligence* (1990) 429.

The defendant's explanation must be reasonable and he is not entitled to rely on conjecture or speculation, nor will the inference of negligence necessarily be rebutted where the explanation is a remote or unusual eventuality [42]. The plaintiff is also not required to disprove unlikely or improbable explanations which seek to absolve the defendant [43]. The defendant is, however, not required to prove that his explanation is more probable to be correct than any other explanation [44].

The case of **McLean v Weir, Goff and Royal Inland Hospital** [45] provides an example of an explanation which was accepted by the court. In *casu* the plaintiff sued the surgeon after suffering quadriplegia following an operation under circumstances where the defendant did not inform the plaintiff that this complication could ensue from the intended procedure. At the trial the plaintiff relied on *res ipsa loquitur* but called no expert. The defendant,

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[42] **Ballard v North British Railway Co supra 43 54**; **Moore v R Fox and Sons supra 595**; **Colevilles v Devine supra 475**; **Holmes v Board of Trustees of the City of London supra 67**; **Ratcliffe v Plymouth and Torbay HA supra 172**.
[43] **Bull v Devon Health Authority supra 117**.
[44] **Ratcliffe v Plymouth and Torbay HA supra 172**.
[45] **[1980] 4 WWR 330 (BCCA)**. See also Jones 79.

however, called an expert to show that he had not been guilty of negligence. The plaintiff did not challenge this evidence and at the end of the trial the court found that the plaintiff had failed to discharge the *onus*. It also held that under these circumstances the doctrine could not be relied upon, so that the plaintiff could only succeed if he could prove negligence.

In **Glass v Cambridge Health Authority** [46] on the other hand, the court rejected the defendant's explanation for the plaintiff's cardiac arrest under general anaesthetic. The defendant alleged that the plaintiff had suffered from a gas embolism caused by oxygen entering the bloodstream as a result of the use of hydrogen peroxide in the cleansing and irrigation track of plaintiff's wound. The court found at best for the defendant, such explanation was a highly unlikely possibility. Rix J held as follows in this regard:

> "I also find that, in the circumstances of this case the evidential burden of proving that the cardiac arrest was not caused by *hypoxia* rests upon the Authority, and that they have failed to discharge that burden. It is not disputed by the Authority, that, if the cardiac arrest was caused by *hypoxia*, then they cannot escape liability in negligence".

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[46] **[1995] 6 Med LR 91**(**QB**) **107**. See also 122ff infra.

3.6 MEDICAL NEGLIGENCE

3.6.1 INTRODUCTION

It is widely accepted that much of medical practice cannot be regarded as to fall within the notion of 'the ordinary course of things' about which the courts are able to make common sense judgments and therefore it can be argued that *res ipsa loquitur* should rarely, if ever, be applied to medical negligence cases.

Kennedy and Grubb [47] suggest that there are two reasons why the doctrine will usually not be available to a plaintiff in a medical negligence action.

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[47] Kennedy and Grubb *Medical Law Text with Materials* (1994) 466. They refer to the case of **Bull v Devon HA supra 117** where Mustill LJ *inter alia* commented as follows: "…The plaintiff's advisers were able to put into evidence from the records as part of their case the outlines of what actually happened. They called expert testimony to establish what should have happened, and could point to a disconformity between what the witnesses said should have happened and what actually happened. The defendants themselves also gave some evidence, meagre as it was because of the lack of time, which added a few more facts about the course of events. I do not see that the present situation calls for recourse to an evidentiary presumption applicable to cases where the defendant does and the plaintiff does not, have within his grasp the means of knowing how the accident took place. Here all the facts that are ever going to be known are before the court. The judge held that they point to liability and I agree…".

The first reason is that medical practice involves the uncertainties of an inexact science. Secondly a plaintiff is presently not at such a disadvantage as he was in the past because of the amendments in procedure. Modern developments in the practice of discovery and exchange of evidence together with the more careful practice of recording and maintaining proper and accurate medical records usually enables the plaintiff to ascertain what actually happened.

Nelson-Jones and Burton, however, hold the view that the application of the doctrine to medical accidents could be of particular significance because of the fact that the operation is often complex and the plaintiff unconscious at the time [48].

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[48] Nelson-Jones and Burton *Medical Negligence Case Law* (1995) 85. Jones *"Res Ipsa Loquitur in Medical Negligence Actions: Enough Said"* 1998 *PN* 174 (contra) opines that in practice it is comparatively rare for *res ipsa loquitur* to play a conclusive role in a medical negligence case for basically the same reasons advanced by Kennedy and Grubb. See also: **Roe v Ministry of Health supra 80**; **O'Malley-Williams v Board of Governors of the National Hospital of Nervous Diseases [1975] 1 BMJ 635**; **Fletcher v Bench [1973] 4 BMJ 118 (CA)**.

Despite the divergence of opinion with regard to the utility of the application of *res ipsa loquitur* to medical negligence cases among academics the evidentiary role of the doctrine remains an important injunct to justice where a plaintiff is, due to the circumstances of the case unable to point a finger at either the technique or the person who might be responsible for his injury [49].

3.7 CASE LAW

3.7.1 INTRODUCTION

Lord Denning's judgment in **Cassidy v Ministry of Health** [50] is regarded as the *locus classicus* on the application of the doctrine of *res ipsa loquitur* to medical negligence cases in English law [51]. The often quoted portion of the judgment reads as follows:

> "If the plaintiff had to prove that some particular doctor or nurse was negligent he would not be able to do it. But he was not put to that impossible task: He says, 'I went into the

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[49] Puxton QC: See her commentary on **Delaney v Southmead Health Authority supra 355** to this effect (Her comment follows after the report in the Med LR of the case).
[50] Kennedy and Grubb 466.
[51] **supra 574**.

> hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it if you can". I am quite clearly of the opinion that that raises a *prima facie* case against the hospital authorities…They have nowhere explained how it could happen without negligence. They have busied themselves in saying that this or that member of their staff was not negligent. But they have called not a single person to say that the injuries were consistent with due care on the part of all members of their staff…They have not therefor displaced the *prima facie* case against them and are liable in damages to the plaintiff" [52].

In contra distinction to the position in South Africa there is a panoply of reported authorities relating to the application of the doctrine to medical negligence cases in England and it is therefore possible to categorize its application to particular procedures in medical context.[53]

3.7.2 RETAINED SURGICAL PRODUCTS

The application of the doctrine presents little difficulties in relatively extreme cases such as the amputation of the wrong limb. The retention of

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[52] **supra 574**. See also: Denning *The Discipline of Law* (1979) 238; Power and Harris 18.

[53] The relevant case law provides a clear indication of how the doctrine is applied in practice and its utility in respect of medical negligence cases.

surgical products in a patient's body will most likely be found to be an act of negligence but it cannot be stated in advance that the doctrine will always be applied in such circumstances [54]. In **James v Dunlop** [55] the plaintiff's husband underwent a gall-stone operation but remained ill. The surgical pack which remained in Mr. James' body since the initial operation had formed a fistula which eventually caused Mr James' death a few days later. In a subsequent action instituted by the widow of Mr James the defendant's evidence was to the effect that he had asked the nursing staff whether all the swabs were out and heard a female voice in confirmation. He could however not positively identify the nurse in question.

The court found that the count check (which was allegedly done) did not absolve the surgeon from conducting his own search. Due to the size of the surgical pack the court found that it was carelessly retained but moreover was not satisfied on the evidence, that a suitable assurance had been given by the nursing staff.

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[54] Jones 142; Nelson-Jones and Burton 88.
[55] **supra 730**. See also: Lewis 386; Jones 140.

The plaintiff in **Morris v Winsbury-White** [56] underwent a two-stage prostate operation and as a result of the findings of a subsequent radiological investigation a further operation was performed on him. During this procedure it was found that a large part of a tube which was utilized in the initial procedures remained in the bladder and a smaller part in the perineum. The plaintiff instituted an action against the surgeon for negligence and breach of contract. In this instance the court found that the nursing staff were not agents of the specialist surgeon who performs an operation in so far as they are performing their ordinary hospital duties.

Tucker J further found that *res ipsa loquitur* was inapplicable because the plaintiff was treated by numerous nurses and sisters, and two resident medical officers and being visited occasionally by the defendant. He was by no means in the control or charge or power of the defendant throughout the whole period [57].

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[56] **supra 494**. See also: Lewis 259; Jones 102; Nelson-Jones and Burton 86.

[57] Dugdale *et al* 15.26 say the following in this regard: "Res ipsa loquitur will only operate in circumstances where the plaintiff can show that the defendant had exclusive control of the operation which caused the injury…This approach has made the maxim difficult to use in a situation in which surgical or other medical treatment provided by a number of persons has produced untoward results. A number of cases are recorded of patients being denied the use of the maxim when surgical items or foreign substances have been left in their bodies during a course of treatment".

The court also found that the agreement between the plaintiff and the defendant did not cast an additional material burden on the defendant who had carried out his obligations under the contract and who was not guilty of negligence.

Inroads with regard to the requirement of exclusive control were made in **Mahon v Osborne** [58] where the facts were briefly as follows: Mr Osborne, a resident surgeon at Park Hospital in Manchester operated on Thomas Mahon for a duodenal ulcer. Surgical packs were utilized to pack off the adjacent areas. At the end of the operation Mr Osborne removed all the swabs of which he was aware and also conducted a swab count in conjunction with the theatre sister. After verifying the swab count with the theatre sister he proceeded to stitch up Mr Mahon. Subsequently Mr Mahon became gravely ill and required further surgery. In the course of the subsequent surgery a packing swab (which was left behind during the first operation) was discovered, lying just under the part of the liver which is close to the stomach. It's presence had already caused an abscess which ultimately resulted in Mr Mahon's death a day later.

In a subsequent action instituted by the mother of the deceased the majority of the Court of Appeal found that the doctrine of *res ipsa loquitur* did not

[58] **supra 14**.

apply in the case of a complicated surgical operation since an ordinary reasonable man, knowing all the facts, could not, without the assistance of expert evidence regarding the precautions necessary in such an operation, say that the events which had occurred must have been due to a failure on the part of the surgeon to exercise due care. In this regard Scott LJ in his judgment stated that an ordinary judge could not have sufficient knowledge of surgical operations to draw such an inference because he has no knowledge of 'the ordinary course of things' in a complicated abdominal operation.

Lord Justice Goddard dissenting, opined as follows:

> "I think it right to say that, in my opinion, the doctrine of *res ipsa loquitur* does apply in such a case as this, at least to the extent I mention below. The surgeon is in command of the operation. It is for him to decide what instruments, swabs and the like are to be used, and it is he who uses them. The patient, or, if he dies, his representatives, can know nothing about this matter. There can be no possible question but that neither swabs nor instruments are ordinarily left in the patient's body, and no one would venture to say it is proper, though it may be excusable, so to leave them. If, therefor, a swab is left in the patient's body, it seems to be clear that the surgeon is called upon for an explanation" [59].

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[59] **supra 50**. See also: Jackson and Powell 480; Lewis 268; Jones 100; Power and Harris 18-19; Kennedy and Grubb 466; Nelson-Jones and Burton 86; Clerk and Lindsell 439; Davies *Textbook on Medical Law* (1997) 96.

In **Garner v Morrell** [60] the court also applied the doctrine against both defendants. The plaintiff consulted the defendants for the purpose of having teeth extracted. During the course of the extraction procedure under anaesthetic, Mr. Garner swallowed or inhaled a throat pack which had been placed in his mouth as a consequence whereof he died of asphyxia. In a subsequent claim for damages by his widow the court held that the throat pack was too short and the occurrence called for an explanation by the defendants. The explanation offered by the defendants was rejected by the court and it found that the accident could and should have been avoided. The fact that a similar incident had never happened before, also weighed against the defendants.

In **Cooper v Neville** [61] Mrs. Cooper underwent a difficult emergency operation in which a swab was also retained in her body. She consequently suffered severe pain and mental anguish and required a further major operation. The court held that once it was undisputed that a swab had

[60] **[1953] The Times 31 October (CA)**. See also: Lewis 269; Jones 100; Nelson-Jones and Burton 88. This case could obviously also be categorised under anaesthetical and or dental procedures.
[61] **[1961] The Times 10 March (PC)**. See also: Lewis 387; Jones 142.

been left in the body there must have been some mistake by the operating team which did not necessarily imply negligence.

The whole team was involved in a race against time. A mistake which would have amounted to negligence in a 'cold' operation might amount to no more than a misadventure in a 'hot' operation. In this instance there was no evidence to suggest what kind of mistake was involved. The presiding judge found that if the pack was a mopping pack, it was negligence (on the part of the person who used it, whether it was the defendant or his assistant) to lose control of it and leave it in the body. If it was a restraining pack, because of the smaller number used and their obvious positions, the absence of movement and lack of any particular need for haste at the conclusion of the operation, it was also negligence on the part of the defendant not to remove it, the responsibility, as he had admitted, upon him to do so, and there being no justification to depart from the usual routine [62].

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[62] See also in general: **Dryden v Surrey County Council [1936] 2 All ER 535**; **Urry v Bierer [1955] The Times 15 July (CA)**; **Needham v Biograph Transplant Centre Ltd [1983] The Times 16 February (QB)**; **Pask v Bexley Health Authority [1988] CLY 1098 (CA);** Lewis 269; Jones 140ff; Nelson-Jones and Burton 86.

The cases on retained surgical products are to the effect that the operating surgeon cannot simply rely on the nursing staff to do a proper count but there is obviously also a high duty on the nursing staff in this context [63].

In **Brown v Guys & Lewisham NHS Trust** [64] on the other hand, Mrs. Brown underwent a multiple myomectomy in 1992. Approximately two years later and after much pain and suffering an exploratory operation was performed on her and a nylon stitch was excised. After the operation Mrs Brown suffered no more pain and discomfort other than was normal for that operation. In a subsequent action for damages it was her case that in December 1992 she underwent a routine operation and she should have recovered within six to eight weeks. Instead she suffered pain and discomfort until the second operation. She relied on the maxim of *res ipsa loquitur*.

In this instance the court held that the plaintiff's discomfort may have been due to keloid and not necessarily to the nylon stitch. It also found that *res ipsa loquitur* did not apply in this case and that the keloid was in any event excised during the exploratory operation.

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[63] Nelson-Jones and Burton 93; **Cassidy v Ministry of Health supra 176**.
[64] **[1997] 8 Med LR 132**.

3.7.3 ANAESTHETIC PROCEDURES

For an overwhelming majority of patients anaesthesia is usually uneventful yet it represents a high insurance risk for the medical profession mainly because the anaesthetist manipulates the physiology of the cardiovascular and respiratory systems. The anaesthetist also administers potentially lethal drugs which are not primarily therapeutic and when a serious accident occurs, it may result in hypoxemia or ischaemia within seconds or minutes, culminating in death or serious neurological damage [65]. As the patient is usually unconscious when a medical accident of this nature occurs, *res ipsa loquitur* could play a significant role in cases relating to anaesthetic accidents.

In **Roe v Ministry of Health (Wooley v Ministry of Health)** [66] the plaintiffs underwent surgery for minor complaints. The defendant Dr Graham conducted a private practice but also provided a regular anaesthetic service for the hospital. In both Roe and Wooley's cases phenol, in which the glass ampoules containing the anaesthetic had been emmersed,

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[65] Jackson *A Practical Guide to Medicine and the Law* (1991) 45.
[66] **supra 66**.

percolated through invisible cracks in each ampoule. It resulted in the contamination of the spinal anaesthetic which both plaintiffs received. Each plaintiff developed a condition of spastic paraplegia and was permanently paralysed from the waist down. They both sued Dr Graham and the hospital authorities. On appeal the court found that the maxim of *res ipsa loquitur* was applicable. Denning LJ held as follows in this regard:

> "The judge has said that those facts do not speak for themselves, but I think they do. They certainly call for an explanation. Each of these plaintiffs is entitled to say to the hospital: 'While I was in your hands something has been done to me which has wrecked my life. Please explain how it has come to pass.'…I approach this case, therefore, on the footing that the hospital authorities and Dr Graham were called on to give an explanation of what has happened. But I think they have done so" [67].

The court found that the hospital authorities were liable for Dr Graham's acts but the hospital had explained how the accident occurred and applying the standard knowledge to be imputed to competent anaesthetists in 1947, Dr Graham was held not to be not negligent in failing to appreciate the risk.

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[67] **supra 137**. See also: Eddy *Professional Negligence* (1955) 18; Denning 241; Lewis 267; Kennedy and Grubb 466; Weir *A Casebook On Tort* (1988) 141; Nelson-Jones and Burton 87.

Mr O'Malley-Williams in **O'Malley-Williams v Governors of National Hospital for Nervous Diseases** [68] underwent an aortogram after stenosis of the right carotid artery was diagnosed. The anaesthetist successfully punctured the plaintiff's femoral artery in his right groin but encountered an obstruction before the guide wire travelled more than five or six inches up the artery. He then decided to abandon that route and inserted the catheter in the right axillary artery. He had to make several passes before the artery was successfully punctured, as a consequence whereof the plaintiff suffered great pain. The plaintiff thereafter suffered neurological complications which caused partial paralyses to his right hand. In a subsequent action for damages by the plaintiff the court held that severe pain was not uncommon in procedures of that kind and the anaesthetist was not negligent in continuing trying to get to the artery. *Res ipsa loquitur* did not apply because the complication was recognised as an inherent risk of the procedure. With regard to informed consent, the court found that the failure to warn of remote risks in the absence of questions by the patient was not negligent. Judgment was accordingly granted in favour of the defendants.

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[68] **supra 635**. See also Jones 100.

The plaintiff in **Saunders v Leeds Western Health Authority** [69] underwent an operation to correct a congenitally dislocated hip when she was four years old. She suffered a cardiac arrest lasting for approximately forty minutes during the operation and as a consequence she suffered permanent brain damage due to hypoxia. She became permanently paraplegic, mentally retarded and blind. In a subsequent action against the anaesthetist and the Health authority the plaintiff relied on *res ipsa loquitur* on the basis that the heart of a fit and healthy child does not arrest under anaesthetics unless there was negligence. The defendants sought to explain the cardiac arrest as being due to a paradoxical air embolism travelling from the operation sight and blocking a coronary artery. This was not accepted as a plausible explanation and the defendants were held to have failed to discharge the *onus* upon them.

In **Jacobs v Great Yarmouth and Waveney Health Authority,** [70] Mrs Jacobs appealed against a decision by Mr. Justice Forbes who had dismissed her action against the defendants wherein she claimed that she had been injured by negligent pre-operative administration of an anaesthetic, when

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[69] **supra 255**. See also: Lewis 268; Jones 101; Davies 97; Phillips *Medical Negligence Law: Seeking a Balance* (1997) 22-23.
[70] **[1995] 6 Med LR 192 (CA)**.

she underwent a hysterectomy. It was contended on her behalf that the court was not entitled to conclude on the evidence that her memory, after she came round from the anaesthetic, would be likely to be unreliable. On the medical evidence the plaintiff's memory could only be sensibly explained in terms of being a pre-operation memory, in which case it must follow that negligence had been established against the defendants because of the operation of the doctrine of *res ipsa loquitur*.

The court dismissed the appeal for a number of reasons but found as far as the maxim of *res ipsa loquitur* is concerned that it meant no more than on the facts that a plaintiff was able to prove although he or she might not be able to point to a particular negligent act or omission on the part of the defendants, that the fair inference to draw was that there had been negligence of some sort on the part of the defendants. If the defendants presented further evidence those facts might be shown in an entirely different light and it would not be possible to draw the inference of negligence. *In casu* a *prima facie* case had been established by proving that

the plaintiff had pre-operative awareness, that the *prima facie* case had been fully answered by the evidence in the case and that the balance of probabilities was that the plaintiff had been one of those people who have a degree of awareness, whereas the average patient was entirely unconscious and therefore the court could not on the alternative hypothesis of *res ipsa loquitur*, have attributed negligence to the anaesthetist.

Hutchison J in **Ludlow v Swindon Health Authority** [71] held that if the plaintiff was able to establish that he was conscious and experiencing pain during the period when halothane gas should have been administered, then that set of facts would raise an inference of negligence even in the absence of expert evidence that anaesthetic awareness can only occur in the absence of reasonable anaesthetic care.

In **Delaney v Southmead Health Authority** [72] the plaintiff had a cholocystectomy performed on her and it was later established that she had sustained a lesion of the brachial plexus. In a subsequent appeal by Mrs Delaney the court held that the court *a quo's* finding accorded with the

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[71] **[1995] 5 Med LR 293**.
[72] **supra 355**. See the further discussion of the case **153 infra**.

probabilities and that even if *res ipsa loquitur* applied, it was always open to the defendant to rebut the inference either by giving an explanation of what happened which was inconsistent with negligence or by showing that the defendants had exercised all reasonable care and that was what the trial judge accepted.

In **Howard v Wessex Regional Health Authority** [73] the plaintiff became permanently tetraplegic as a result, she alleged, of trauma during surgery due to some error by the surgical team. It was submitted on her behalf that *res ipsa loquitur* should apply as the plaintiff was unable to point to any particular incident which could account for a trauma to the cervical spine. Morland J held that *res ipsa loquitur* was inappropriate because the plaintiff had to establish, on a balance of probabilities, that her tetraplegia was the result of traumatic injury negligently inflicted on her cervical spine during surgery. If it was equally likely that her tetraplegia was caused by a complication known as FCE her action had to fail. The plaintiff carried the *onus* throughout and as the court found that the probable and likely cause

[73] **supra 57**.

of her tetraplegia was FCE, her action failed.

In the case of **Glass v Cambridge Health Authority,** [74] the plaintiff, who suffered an abdominal wound at work and underwent an exploratory laparotomy at Addenbrooke's Hospital suffered a cardiac arrest after the completion of the operation while still under anaesthesia. As a result he suffered a severe brain injury. The plaintiff sued the Cambridge Health Authority, alleging negligence on the part of the anaesthetist. Rix J held that the plaintiff succeeded on liability and found the doctrine of *res ipsa loquitur* applicable.

He proceeded to decide whether the defendant could provide a reasonable explanation and stated that in his view, and contrary to the plaintiff's submission, the Authority did not have to show that any such explanation is more likely than not to be the cause of the casualty. It is sufficient that any explanation by way of rebuttal consistent with due care on its part be such as would displace what was only a *prima facie* inference. Thus the evidential

[74] **supra 91**. See also **103 supra**.

burden may shift back again to the plaintiff who has to prove on a balance of probabilities that the defendant's actions in fact were the cause of the misfortune [75]. On that basis and on the evidence he found that the evidential burden of proving that the cardiac arrest was not caused by hypoxia, rested on the defendants and on the evidence they failed to discharge it.

In **Ritchie v Chichester Health Authority** [76] the plaintiff suffered total paralysis in the saddle area, double incontinence and loss of vaginal sensation after undergoing an epidural. She instituted proceedings against the defendant alleging that a toxic substance was administered to her during the epidural. With reference to the doctrine of *res ipsa loquitur* Thompson J, referring to the dicta of Stuart-Smith LJ in **Delaney v Southmead Health Authority**, opined that he did not understand the learned Lord Justice to be saying that the maxim is excluded in cases of medical negligence, or that that medical negligence is in a special category which puts it outside the ordinary English law of negligence. All he understood him to be saying is that it may not be a great deal of help where there has been substantial

[75] **supra 96**.
[76] **supra 187**.

medical evidence. If anything, there seems to be confirmation that the maxim does exist in relation to medical negligence cases, but can be rebutted either by giving a positive explanation, such as some other cause of the damage, or by showing that the defendants have exercised all reasonable care [77]. The court found that the plaintiff's neurological deficit had been a *cauda equina* lesion which was caused by the inadvertent intrathecal injection of a neurotoxic substance in the labour ward and in those circumstances the plaintiff succeeded on the issue of liability.

In **Ratcliffe v Plymouth & Torbay Health Authority** [78] the appellant underwent a triple athrodesis of his right ankle following a walking accident two years earlier. He was given both a general anaesthetic and a spinal anaesthetic. The operation was a success but the appellant suffered a serious neurological defect on the right side from the waist downward. The cause

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[77] **supra 206-207**.
[78] **supra 162**.

was a mystery but a MR scan showed a lesion in the spinal cord at T11-T12. The defendants maintained that the spinal injection was administered at L3-L4 level and the neurological weaknesses were consistent with much more extensive injury stretching from T8-S3. During the trial the defendants' expert neurologist and expert neuro-physiologist produced a report on a rare disease known as Non Systemic Vasculitis, which could have been the cause of the neurological defect.

The court found that Dr Boaden administered the spinal anaesthetic with appropriate care and that the plaintiff's nerve damage had been caused by some mechanism as to which it was unable to make a positive finding. It further found that there may have been some kind of asymtomatic weakness in the central nervous system which the stress of the operation had brought to life and that accordingly plaintiff's claim failed. The plaintiff argued on appeal that the judge should not have dismissed the application of the doctrine of *res ipsa loquitur* because the plaintiff's condition raised an inference of negligence. Once the maxim applied, they argued, the *onus* was on the defendants to rebut that inference and they could not do so by raising

an explanation which only ranked as a possibility.

The court, in dismissing the appeal, held that the judge made the positive finding that the anaesthetist had performed the spinal injection in the appropriate place with all proper care. In those circumstances any possible inference of negligence fell away and unless that finding was set aside the plaintiff's claim could not succeed. The Court of Appeal held that the finding that the injection was inserted in the correct space at the chosen level was inevitable and under those circumstances the court *a quo's* approach that the maxim of *res ipsa loquitur* was not applicable, could not be faulted [79].

3.7.4 GENERAL SURGICAL PROCEDURES

Although general surgery is not considered to be a very high risk speciality the number of claims emanating from it has increased through the years. Sufficiency of skill is only acquired by those surgeons who regularly

[79] See the further discussion of the case **infra 153ff**.

undertake particular procedures [80]. In **Cassidy v Ministry of Health** [81] the plaintiff was diagnosed with Dupuytrens contracture and referred to Walton. His arm and hand was bandaged to a splint by a nurse after the operation. Thereafter the plaintiff experienced exceptional pain and was seen by Dr Rolandson and Dr Fahrni. When Dr Fahrni examined the hand he decided to leave the splint and bandage as they were. The plaintiff continued to experience considerable pain but was advised to put up with it. The splint was removed a fortnight after the operation when it was discovered that the plaintiff had lost the use of four of his fingers which had become stiff and bent into the hand. The plaintiff sued the hospital authority but his claim was dismissed *a quo*. On appeal it was held that a *prima facie* case of negligence had been established which had not been rebutted by the defendants. The court held that where hospital authorities undertake to treat a patient and employ professional men and women who treat the patient they are responsible and liable for the negligent acts of their employees.

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[80] Jackson 78.
[81] **supra 574**. See also: Denning 238; Jones 99; Nelson-Jones and Burton 87.

In **Clarke v Worboys** [82] Mrs Clarke underwent a mastectomy of her right breast. As extensive bleeding was expected electro-coagulation was applied which involved the passing of a high frequency alternating current through the patient's body via a pad placed on her right buttock. A severe burn was caused on this buttock, which caused injury to the muscles on a permanent basis. In a subsequent action against the hospital authorities based on the allegation that the hospital staff had not prepared the apparatus properly (by moistening the rod in saline solution prior to application) the court *a quo* dismissed her claim. On appeal the court held that the accident was one of a kind which did not normally happen if reasonable care was used and the evidence was, that if the apparatus was used properly, burning was unknown. The court found that *res ipsa loquitur* applied and the hospital staff was negligent.

In **Levenkind v Churchill-Davidson** [83] the defendant performed a Putti-Platt repair operation on the plaintiff. The musculcutaneous nerve was damaged during surgery as a result of which the plaintiff lost the use of his

[82] **supra 18 March**. See also: Lewis 269; Jones 101; Nelson-Jones and Burton 88.
[83] [**1983] 1 The Lancet 1452 (QB)**. See also: Lewis 270; Power and Harris 19; Jones 106.

muscles in the right upper arm and the biceps became wasted and functionless. The plaintiff instituted an action against the defendant for negligence and relied on the maxim of *res ipsa loquitur*. The court held that on a balance of probabilities the injury was caused by traction and traction with no more than normal force, could have caused the lesion. On that basis the defendant could not be found negligent and the plaintiff's claim failed.

In **Woodhouse v Yorkshire Regional Health Authority** [84] the plaintiff, who was a keen pianist, was admitted to Scarborough General hospital where she underwent an operation for a subphrenic abscess under general anaesthetics. She sued the hospital authorities after her left ulnar nerve was damaged in the first operation and her right ulnar nerve during the second operation. As a result she was left with severe contracture deformities of her hand and an aggravated pre-existing nervous condition. The court held that the plaintiff suffered injuries which ought not to have occurred if standard precautions had been taken. Russel J inferred that these precautions had not been taken and in the absence of an explanation for failing to take them he

[84] **[1984] CA transcript 12 April [1984] 1 The Lancet 1306 (CA)**. See also: Lewis 270; Nelson-Jones and Burton 89.

was entitled to conclude that such failure was negligent. In this instance the court found in the plaintiff's favour.

An infant plaintiff in **Leckie v Brent and Harrow Health Authority** [85] sued the health authorities after she sustained a cut of 1.5 cm on her left cheek in a caesarean section delivery. The wound was sutured after she was handed to the paediatrician. The plaintiff alleged that *res ipsa loquitur* applied and expert evidence tendered to the effect that such a cut was extremely rare and also a concession by the defendant's expert that a cut of this nature should not occur, led the court to hold in the plaintiff's favour.

Mr Guy Randle in **Fallows v Randle** [86] carried out a vaginal termination and laparoscopic sterilization on the plaintiff. She returned to the hospital shortly thereafter experiencing stomach pains and bloodloss. An evacuation of her uterus was performed in a conventional way by a different gynaecologist. Approximately a year later the plaintiff was pregnant again and referred

[85] **supra 634**. See also: Lewis 270; Jones 137.
[86] **[1997] 8 Med LR 160 (CA)**.

back to Mr Randle. He performed a further vaginal termination and re-sterilization. She subsequently underwent a radiological examination which appeared to indicate that there were two “Fallope” rings on each side and both tubes were blocked. She instituted proceedings against the defendants alleging medical negligence. The court accepted the evidence of the plaintiff’s expert that the only explanation for the failure of the operation was negligence in applying the ring, in that it could not have been correctly applied to the *isthmus* or fallopian tube. Against that, theoretical possibilities were advanced which the court did not accept and consequently the court ruled in favour of the plaintiff.

On appeal it was argued on behalf of the defendant that if the plaintiff was to succeed she had to establish a case of *res ipsa loquitur* but on the evidence she could not do so because the failure of the ring, or the slipping off of the ring without negligence were possibilities.

The Court of Appeal dismissed the appeal with costs for a number of reasons, but found with regard to the application of *res ipsa loquitur* that in its judgment, the maxim *res ipsa loquitur* was not helpful in this particular case.

The judge had to decide what was the most probable explanation of what was an unusual and comparatively rare event, namely that that the ring was found not to be in the position that it ought to have been when the second operation was carried out [87].

In **Bouchta v Swindon Health Authority** [88] the plaintiff underwent a abdominal hysterectomy. During the operation or as a result of a subsequent infection the plaintiff's right ureter became blocked resulting in damage to her kidneys. In a subsequent action for negligence against the Health authorities the court found in favour of the plaintiff and said the following with regard to the applicability of the maxim of *res ipsa loquitur*:

> "Miss Edwards has pressed me to find that once the plaintiff proves damages during the operation the burden switches to the defendants to prove a sufficient explanation. I accept that this follows where the doctrine of *res ipsa loquitur*, namely the matter speaks for itself arises. I am reluctant to apply such a test to issues of medical judgment unless I am compelled to do so. Futhermore I have not been addressed at any length nor with citation of authority on this particular issue for which I do not criticize counsel. Accordingly I consider it right to see whether the plaintiff has satisfied me that there was in this instance no good or satisfactory explanation in the light of such matters as the defendants have sought to rely on" [89].

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[87] **supra 164**.
[88] **supra 62**.
[89] **supra 65**.

On 15 June 1981 the plaintiff in **Bentley v Bristol and Weston Health Authority (NO2)** [90] underwent a total hip replacement. Within minutes of her return to the ward the plaintiff was complaining that she could not move her left foot. She was diagnosed as suffering from sciatic nerve paralysis. An exploratory operation was performed on her thereafter and it was ascertained that there was extensive scarring around the sciatic nerve and it was suggested by the operating surgeon that it may have been stretched.

There was, however, no evidence that it was divided or that the nerve was compressed. The plaintiff instituted proceedings against the authorities for medical negligence. The plaintiff succeeded in her action and with regard to the applicability of *res ipsa loquitur*, Waterhouse J remarked *obiter* that if his analysis was incorrect in any respect, except for his rejection of Dr Earl's theory of uninterrupted blood supply to the sciatic nerve, he did not consider that *res ipsa loquitur* was applicable and, in his judgment, the defendants failed to rebut the inference of negligence on the part of the defendant by his or other evidence or by pointing to any tenable explanation of the plaintiff's

[90] **supra 1**.

profound and permanent injury consistent with lack of negligence on his part [91].

In **Hooper v Young** [92] the plaintiff instituted an action for damages after her ureter had been injured during a hysterectomy. She was successful in the court *a quo* but on appeal it was submitted on behalf of the appellant that the judge by his approach did in fact apply the doctrine of *res ipsa loquitur*. It was submitted on behalf of the respondent that the judge excluded the non-negligent situations and thus only a negligent situation remained.

The appeal was allowed and Otton LJ remarked with regard to the maxim of *res ipsa loquitur* that it was a pity in retrospect that the concept of *res ipsa loquitur* ever entered this case. It is primarily a rule of evidence which may have been appropriate in regard to the encirclement and clamping. In his view, however, it had no place in the kinking of a suture which could have occurred without negligence [93].

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[91] **supra 16**.
[92] **[1998] LLR 61** (**CA)**.
[93] **supra 63**.

Mr Moore in **Moore v Worthing District Health Authority** [94] underwent a left mastoidectomy and subsequently suffered bilateral ulnar nerve lesions. He claimed that the lesions were caused by the negligence of the surgeon and the anaesthetist, alleging that the maxim of *res ipsa loquitur* was applicable. The court dismissed the claim and found on a balance of probabilities that the plaintiff suffered a polyneuropathy which rendered him abnormally susceptible to, and caused, the injury. With regard to the maxim of *res ipsa loquitur* Owen J found as follows:

> "If the only evidence here had been the fact that Mr. Moore had entered the hospital without any such condition as that from which he now suffers, and had left the hospital in the condition from which he does now suffer, that would have been a situation where the *res* did indeed speak for itself. But this is not the situation here. Further, it is clear that if the defendants can show a way in which the accident may have occurred without negligence, the cogency of the facts of the accident by itself disappears, and the plaintiff is left as he began, namely that he has to show negligence".

3.7.5 DENTAL PROCEDURES

Certain dental procedures have also been the subject of the possible application of *res ipsa loquitur*. In **Fish v Kapur** [95] the plaintiff consulted

[94] **supra 431**.
[95] **supra 176**.

Dr Kapur with regard to the removal of a wisdom tooth. After the extraction, a part of the root of the tooth remained behind. Her jaw was also fractured. At the trial the plaintiff's experts testified that a fracture of the jaw during extraction was possible without negligence and it was also possible that a part of the root could be retained without blame. The defendant did not lead evidence and the plaintiff relied on *res ipsa loquitur.*

The plaintiff's counsel argued that where a qualified dentist extracts a tooth and, after the extraction, the jaw is found to be fractured, that in itself is *prima facie* evidence of negligence on the part of the dentist. The plaintiff submitted that the doctrine of *res ipsa loquitur* could be applied to a case of that nature. The court held that there had been many cases against dentists, or claims made against them, for fractures occasioned in the course of extraction of teeth. The plaintiff's counsel was not able to refer the court to any authority where a court had held that the fact that a fracture of the jaw is found after a tooth has been extracted is of itself *prima facie* evidence of negligence [96].

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[96] See also: Lewis 269; Jones 102; Nelson-Jones and Burton 88 332.

In **Fletcher v Bench** [97] the defendant removed the plaintiff's lower third molar under local anaesthetic. The defendant utilized a bone-burr because the tooth was impacted and did not respond to the forceps. While drilling, the bone-burr broke and a small piece was retained in the plaintiff's jaw.

The defendant thereafter used another burr to remove the bone around the tooth and extracted the tooth with a forceps. He could not find the piece of broken burr and did not inform the plaintiff of its presence. A day later the plaintiff consulted the defendant and was in much pain. He was also suffering from swelling and stiffness of the jaw. Because the Defendant was away on vacation the plaintiff consulted another dentist on two occasions who found that the socket was infected.

On a later visit it was ascertained by means of radiological investigation that the plaintiff's jaw had fractured due to the infection and that the piece of broken burr was stuck at the point of the fracture. It was subsequently removed. The action was dismissed as the court found that the breaking of the drill and the fact that it was retained were not indicative of lack of care

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[97] **supra 118**.

and as the plaintiff had not been seen by the defendant until after the fracture of the jaw the defendant was not liable.

Miss Betty Lock in **Lock v Scantlebury** [98] had six teeth extracted from her upper jaw and two from her lower jaw by the defendant. After the extraction she visited a doctor who prescribed pain-killing tablets to alleviate her suffering. She returned to the defendant and complained that she could not eat or speak properly and that there was something wrong with her face. He could not find anything amiss. She subsequently consulted him once more and he failed to diagnose a dislocation of her jaw. It was ascertained later that her jaw was indeed dislocated and she was treated manually at the Mount Vernon Hospital. The court found that while the dislocation during the procedure in itself, was not proof of negligence, there had been want of care in the defendants failure to discover the dislocation during subsequent visits.

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[98] **[1963] The Times 25 July**. See also: Lewis 392; Jones 102; Nelson-Jones and Burton 89.

3.7.6 INJECTIONS

Injections frequently give rise to medical negligence cases because they are given in the wrong place, may contain the wrong substance, an excessive dose or the needle may break.

During September 1951, the plaintiff in **Corner v Murray** [99] sustained an injury to his back at work and consulted the defendant who gave him a local anaesthetic at the site of the injury. At the conclusion of the procedure the defendant was about to withdraw the hypodermic needle from the plaintiff's body when it broke off close to the mount. Dr. Murray was unable to extract the broken portion of the needle and referred the plaintiff to the Central Middlesex Hospital where it was surgically removed the next day. The plaintiff instituted a High court action against the defendant alleging negligence on the part of the defendant. Expert evidence was tendered at the trial to the effect that the breaking of hypodermic needles were not an uncommon occurrence, the risk of which had to be accepted and could occur without negligence on the part of the doctor. It was accordingly held that

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[99] **[1954] 2 BMJ 1555**. See also Lewis 270.

there had been no negligence or any semblance of negligence on the part of the defendant.

In **Brazier v Ministry of Defence** [100] a deep-sea diver who had contracted an infected hand while diving in the Suez Canal was treated at the sickbay of HMS Forth. When he was given an injection by the sickbay attendant the needle broke and lodged in the plaintiff's right buttock. It subsequently shifted to Mr. Brazier's groin causing him severe pain and forcing him to give up his work. In a subsequent action against the Ministry of Defence the court rejected the plaintiff's allegation that the syringe was plunged into his buttock from a distance of twelve to eighteen inches and found that the injection was administered in the proper recognized manner. With regard to the fact that the needle was left inside the plaintiff's body the court found that the evidence required an explanation from the defendants.

In this regard the court held that on the evidence which it had reviewed and on which it had stated its findings, that the defendants had clearly given an

[100] **[1965] 1 Lloyds Rep 26**. See also: Lewis 270; Jones 88; Nelson-Jones and Burton 88; Healy 200.

explanation of how this accident could have happened without negligence, and the plaintiff's claim was accordingly dismissed [101].

3.7.7 INFECTION

Postoperative infections and infections acquired while hospitalized often lead to litigation and the doctrine has also been applied to cases of this nature.

The plaintiff in **Lowen v Hopper** [102] instituted proceedings against the defendants after her right arm became septic following a blood donation at Rochford Municipal hospital. She alleged that the defendants failed to take proper anti-septic measures and also that a sister had failed to make a proper examination and replace a sodden dressing after she complained that she was losing an undue quantity of blood. The action was dismissed against Dr Hopper for lack of evidence of negligence on his part. The jury was directed that the mere fact that the arm became septic after the

[101] **supra 30**.
[102] **[1950] 1 BMJ 792**.

procedure did not of itself establish negligence. They had to decide whether the procedure caused the harm alleged. There was some evidence from which they might infer that germs had entered the plaintiff's system from the bloodsoaked dressing. The jury found in favour of the plaintiff.

The plaintiff in **Hucks v Cole** [103] instituted an action against the defendant for the latter's alleged failure to treat the plaintiff with penicillin which resulted in the plaintiff contracting septicaemia. The trial judge held the defendant liable and the Court of Appeal subsequently confirmed the judgment. With regard to *res ipsa loquitur* Lord Denning remarked as follows:

> "…a doctor is not to be held negligent simply because something goes wrong. It is not right to invoke against him the maxim of *res ipsa loquitur* save in extreme cases" [104].

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[103] **[1993] 4 Med LR 393**. See also: **Lindsay County Council v Marshall [1937] AC 97**; **Heafield v Crane The Times July 1937**; **Vancouver General Hospital v McDaniel (1934) LT 56**; Jones 144.
[104] **supra 396**.

In **Voller v Portsmouth Corporation** [105] the plaintiff fractured a femur while playing football. At the hospital he was given a spinal injection of Nupercaine. A few days later he was diagnosed as suffering from meningitis. Due to the injection he became permanently disabled. In an action against the hospital and the doctors who treated him the court found that there was no negligence against the doctors who treated him but held that there must have been some breach of aseptic technique at the hospital. The only remaining source of the infection was in the apparatus used in the procedure. This was within the control of the hospital and it's staff and the authority was held liable.

3.7.8 DUTY OF CARE

On occasion an alleged breach of duty of care has also been the subject of the application of the doctrine of *res ipsa loquitur*.

In **Hay v Grampian Health Board** [106] the pursuer acting as *curator bonis* for Miss Hill who was admitted to Royal Cornhill Hospital suffering from

[105] **supra 264**. See also Jones 145.
[106] **supra 128**.

depressive illness, instituted an action against the defenders for alleged negligence in the management and handling of Miss Gill as she was able to attempt suicide resulting in irreversible brain damage. With regard to the applicability of *res ipsa loquitur* which the pursuer's counsel relied on, Lord Johnston found that in his opinion the brocard or maxim is available to effect a transfer of *onus* in circumstances where an event occurs which calls for an explanation, and no explanation is forthcoming. By definition, if an explanation is forthcoming, not only is there no switch of *onus* but the matter must be looked at in the context of whether the explanation promotes negligence on the part of the alleged wrongdoer.

Since the presence of nurse Davidson would obviously have prevented the attempted suicide, an explanation for it having happened is available and that established the basis upon which any negligence on the part of the defenders had to be assessed. The court found that the case turned upon whether or not the fact that the patient was able to proceed to the bathroom unaccompanied and attempt suicide amounted to negligence on the part of the defenders [107].

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[107] **supra 132**.

In **Bull v Devon AHA** [108] Mrs Bull instituted an action against the defendant Health authority personally and on behalf of her disabled son. She claimed that her son was disabled due to asphyxia at birth which was caused by the negligence of the Health authority and the staff employed by it. She alleged that the asphyxia was due to the fact that the delivery of her son was delayed because a doctor was not available to attend to her. It was accepted by the Court of Appeal that the defendant owed her and her son a duty of care. The plaintiff called expert evidence to establish what should have happened and could indicate that there was a disconformity between what should have happened and what in fact did take place.

Under these circumstances Mustill LJ found with regard to the application of *res ipsa loquitur* that he did not see that the circumstances called for resource to an evidentiary presumption applicable in cases where the

[108] **supra 117**. See also **Whitehouse v Jordan [1980] 1 All ER 650 (CA) 658** per Lawton LJ: "The first sentence suggests that, because the baby suffered damage, therefore Mr Jordan is at fault. In other words *res ipsa loquitur* that would be an error. In a high-risk case, damage during birth is quite possible, even though all care is used. No inference of negligence should be drawn from it". See also: Lewis 250; Jones 95; Kennedy and Grubb 413.

defendant did, and the plaintiff did not, have within his grasp the means of knowing how the accident took place. The court found that all the facts that were ever going to be known were before the court and that they point to liability [109].

3.8 LEGAL OPINION

3.8.1 INTRODUCTION

Reported authorities do not really bear out Kennedy and Grubbs' contention that the application of *res ipsa loquitur* to medical negligence cases can be regarded as exceptional [110]. A much more contentious issue seems to be the value of a plea of *res ipsa loquitur* to a plaintiff in a medical negligence action.

There also seems to be a constant endeavour by the courts to contain the doctrine as far as possible because of the fear that once the inference is

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[109] See also **104 supra** fn 47.
[110] Kennedy and Grubb 446.

drawn, the defendant is at such a disadvantage that the result is that the injustice which the invocation of the doctrine seeks to overcome is transferred from the plaintiff to the defendant.

Foster submits that this fear is without merit. He opines that defendants often even gain a significant advantage by insisting that the maxim should be invoked. He submits that a *res ipsa loquitur* analysis and a *Bolam* analysis of the same set of facts might very well have different consequences for the defendant [111].

When the maxim is invoked the defendant may escape liability in two ways. He can provide an explanation of what had happened which is inconsistent with negligence or he can show that he had taken all reasonable care. Foster says that an explanation which is inconsistent with negligence conflates the tests for breach of duty and causation. A breach of duty will not be inferred if a non – negligent of what happened can be coherently established. If,

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[111] Foster 1996 *SJ* 824-825. In terms of the **Bolam test** a doctor is not negligent if he acted in accordance with the practice accepted at the time as proper by a responsible body of medical opinion, notwithstanding that other doctors adopted different practices. **Bolam v Friern Barnet Management Committee [1957] WLR 582**.

however, the *Bolam* test [112] is applied to this sameset of facts it means that the court would have to be satisfied that the non-negligent explanation offered by the defendant is at least supported by a recognised body of expert medical opinion in the applicable medical discipline, which, he submits, may under certain given circumstances make the defendant considerably more vulnerable.

3.8.2 ADVANTAGE FOR THE PLAINTIFF

The most important advantage for a plaintiff who seeks to invoke *res ipsa loquitur* is that it prevents a defendant who knows what happened from avoiding liability simply by electing not to tender any evidence.

An important aspect of the application of the doctrine to medical negligence cases is also the fact that it is widely accepted that medical treatment carries certain risks and that the occurrence of injury is not necessarily evidence of

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[112] For a further discussion of the **Bolam test** see also: Lewis 287; Giesen 91; Kennedy and Grubb 172ff; Jones 58ff. **Sidaway v Board of Governers of the Bethlehem Royal Hospital and the Maudsley Hospital [1985] 1 All ER 643 (HL)**.

lack of reasonable care [113]. Jones, however, correctly points out that there is a distinction between saying on the one hand that 'things can go wrong in medicine' or that medicine is not an exact science and an untoward result is not necessarily evidence of negligence, and on the other hand saying that this particular procedure carries a specific risk of a particular complication and this complication has occurred [114].

The former statement makes a vague appeal to risk in general to deny the application of *res ipsa loquitur*. Such an approach would not necessarily be confined to medical treatment and in effect seeks to deny the validity of the doctrine entirely. The latter approach however, identifies a particular feature of the circumstances ie an inherent and specific risk which provides a reasonable explanation of how the accident could have occurred without negligence [115].

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[113] **Roe v Ministry of Health supra 80**; **O'Malley-Williams v Board of Governors of the National Hospital for Nervous Diseases supra 635**; **Fletcher v Bench supra 17**.
[114] Jones 1998 *PN* 175.
[115] Ibid.

The value of the application of the doctrine to medical negligence cases is obviously determined by the approach of the court with regard to the explanation offered by the defendant [116]. There are two divergent views with regard to the effect of the invocation of the maxim of *res ipsa loquitur* on the burden of proof. The first is that it raises a *prima facie* inference of negligence which requires the defendant to establish some plausible explanation of how the accident could have occurred without negligence. In the absence of such evidence the *prima facie* case is established and the plaintiff succeeds. If the defendant does adduce evidence which is consistent with the absence of negligence on his part the inference of negligence is rebutted and if the plaintiff is unable to provide further direct evidence (which will usually be the case if he relies on the doctrine) that the accident was occasioned as a result of want of care by the defendant, he will fail. On this basis the burden of proof does not shift to the defendant, but rests throughout the case on the plaintiff. Under these circumstances it is submitted that the defendant's position is no different to that which arises when he is faced with positive evidence from the plaintiff which raises an inference of negligence.

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[116] Ibid 176.

The alternative view is that the invocation of the doctrine has the effect of reversing the burden of proof so that the defendant is required to show that the injury was not attributable to any lack of care on his part. While Jones is of the opinion that the differences between the two views have probably been exaggerated it is submitted that a shifting of the burden of proof to the defendant under these circumstances would have the effect that such a plaintiff is in a better position than a plaintiff who has established a *prima facie* case by way of direct evidence [117].

It is also submitted that the defendants would conduct their defence differently if they are confronted with a formal shifting of the burden of proof. Issues such as the standard of proof required to discharge the burden of proof would have to be addressed and there would for example be no room for closing the defendant's case without the leading of exculpatory evidence. Compared to the situation where an inference of negligence is drawn but where the *onus* is not shifted to the defendant, the court may hold that *res ipsa loquitur* applies, reject a motion of no case by the defendants

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[117] Jones 106.

but still find in favour of the defendants even if they tender no exculpatory evidence. In this regard Rogers opines that:

> "In practice, however, it is impossible for a judge sitting alone to distinguish so sharply between his functions as a judge of law and a judge of fact. If he is not prepared to hold that, in the absence of some evidence by the defendant, the plaintiff has sufficiently proved negligence by proving the fact of the accident alone, he will not hold that *res ipsa loquitur* applies in the first place. But if he holds that it does apply then that will compel rather than merely justify, a decision for the plaintiff in the absence of rebutting evidence" [118].

An exculpatory explanation will not necessarily rebut the inference of negligence particularly if the explanation is a remote or unusual eventuality. The defendant is not entitled to rely on conjecture or speculation when he tenders his explanation. The plaintiff is also not required to disprove every theoretical explanation, however unlikely which seeks to absolve the defendant [119]. It is also not strictly necessary for the defendant to disprove negligence and it is regarded as sufficient if the explanation neutralizes the inference created by the *res* [120].

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[118] Rogers 191-192.
[119] **Bull v Devon Health Authority supra 138.**
[120] Jones 1998 *PN* 176.

Courts have exhibited a tendency in the context of medical accidents to accept explanations which rely heavily on the inherent uncertainty of medical practice and the existence of risks and consequences which may ultimately be inexplicable [121]. In the case of **Ratcliffe v Plymouth and Torbay Health Authority** Brooke LJ summarised the application of the doctrine to medical negligence cases as follows:

> ‘(1) In its purest form the maxim applies where the plaintiff relies on the *res* (the thing itself) to raise the inference of negligence, which is supported by ordinary human experience, with no need for expert evidence.
> (2) In principle, the maxim can be applied in that form in simple situations in the medical negligence field (surgeon cuts off right foot instead of left; swab left in operation site; patient wakes up in the course of surgical operation despite general anaesthetic).
> (3) In practice, in contested medical negligence cases the evidence of the plaintiff, which establishes the *res*, is likely to be buttressed by expert evidence to the effect that the matter complained of does not ordinarily occur in the absence of negligence.
> (4) The position may then be reached at the close of plaintiff’s case that the judge would be entitled to infer negligence on the defendant’s part unless the defendant adduces evidence which discharges this inference.

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[121] See for example **Howard v Wessex Regional Health Authority supra 57**.

(5) This evidence may be to the effect that there is a plausible explanation of what may have happened which does not connote any negligence on the defendant's part. The explanation must be a plausible one and not a theoretically or remotely possible one, but the defendant certainly does not have to prove that his explanation is more likely to be correct than any other. If the plaintiff has no other evidence of negligence to rely on, his claim will then fail.

(6) Alternatively, the defendant's evidence may satisfy the judge on a balance of probabilities that he did exercise proper care. If the untoward outcome is extremely rare, or is impossible to explain in the light of the current state of medical knowledge, the judge will be bound to exercise great care in evaluating the evidence before making such a finding, but if he does so, the prima facie inference of negligence is rebutted and the plaintiff's claim will fail. The reason why the courts are willing to adopt this approach, particularly in very complex cases is to be found in the judgments of Stuart-Smith and Dillon LJJ in *Delaney*.

(7) It follows from all this that although in very simple situations the *res* may speak at the end of the lay evidence adduced on behalf of the plaintiff, in practice the evidence is then buttressed by expert evidence adduced on his behalf, and if the defendant were to call no evidence, the judge would be deciding the case on inferences he was entitled to draw from the whole of the evidence (including the expert evidence), and not on the application of the maxim in its purest form' [122].

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[122] **supra 172-173**.

Foster is of the view that this judgment constitutes a radical debunking of the confused 'legal mumbo-jumbo' which has surrounded the doctrine and that as far as the doctrine is concerned common-sense and the law of evidence are co-extensive. As far as the defendant's explanation is concerned Foster opines that **Ratcliffe** rehabilitates and endorses honest doubt by explaining why the court will be sympathetic to a defendant who comes to court and says that these 'untoward results' sometimes occur and it is not always possible to identify the exact cause [123].

Jones refers to the judgments of **Ratcliffe** and **Delaney** [124] as examples which indicate that the application of the doctrine to medical negligence

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[123] Foster 1998 *SJ* 762ff. He refers to part of LJ Brooke's judgment this regard which reads as follows: "the human body is not a man-made engine. It is possible that a man's body contains hidden weaknesses, particularly after nearly fifty years of life, which there has been no previous reason to identify. Medical science is not all-knowing. The Greek tragedian Aeschylus addressed the unforeseen predicaments of human frailty in terms of the sport of the gods. In a modern scientific age, the wisest will sometimes have to say: 'I simply do not know what happened'. The courts would be doing the practice of medicine a considerable disservice if in such a case, because a patient has suffered a grievous and unexpected outturn from a visit to a hospital, a careful doctor is ordered compensation as if he had been negligent in the care he afforded to his patient ".

[124] Jones 1998 *PN* 178; **Delaney v Southmead HA supra 355**.

cases is of limited value to the plaintiff. In **Ratcliffe's** case the aetiology of the plaintiff's condition according to the defendant's hypothesis (which only emerged three days into the trial), was an extremely rare and unexplained complication of surgery. This hypothesis was nevertheless accepted as the causal mechanism by both the trial judge and the Court of Appeal.

In **Delaney's** case the Court of Appeal accepted that a defendant was entitled to rely on evidence as to his normal practice to rebut the inference of negligence. In this appeal the plaintiff argued that *res ipsa loquitur* should have been applied by the judge because the trial court found as a fact that the plaintiff had suffered an injury to the *brachial plexus*, that the plaintiff had suffered the injury during the course of the operation and that there was no explanation for the plaintiff's injury other than that the arm had been hyper-abducted and/or externally rotated. The Court of Appeal rejected this approach on the basis that the trial judge's findings on breach of duty were consistent with the probabilities, because the defendant probably acted

in accordance with his usual practice and also the fact that the *cannula* for the administration of the intravenous drip had been placed at the back of the plaintiff's hand which militated against the need to rotate the hand externally. In this instance the defendant did not succeed in tendering an explanation of what had happened to the plaintiff which was inconsistent with negligence but had proved to the judge that he had exercised all reasonable care. The aforesaid proof of reasonable care was however not based on direct evidence of his treatment of the plaintiff but on the defendant's evidence as to his normal practice. The trial judge considered the defendant to be a careful and conscientious professional and on that basis accepted on a balance of probabilities that the defendant would not have departed from his normal practice.

Even though expert medical evidence tendered on behalf of the plaintiff, supported by medical literature, demonstrated that there were effectively only two possible explanations for brachial plexus palsy (a narrowing of the thoracic outlet or hyper-abduction or external rotation of the arm), the trial judge rejected the first possibility but was not prepared to accept the only

other remaining possibility as a probable cause. The court ascribed the complication to the variability and unpredictability of the human body [125]. Jones points out that the difficulty from the plaintiff's perspective in this regard was that this result was not totally unexpected in the sense that it was not completely inexplicable to medical science. There was in fact a body of medical literature identifying the risk and the known causes to the effect that the reasonable explanation that medical science would have given to the complication was one that involved the conclusion that the defendant had been negligent. It was only if one accepted the defendant's evidence that his usual practice was a reasonable practice and that he must have followed it on this occasion (which was in dispute) that the plaintiff's injury became 'inexplicable' [126].

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[125] **supra 359** Per Stuart-Smith LJ: "…If the human body was a machine where it is possible to see the internal workings and which operates in accordance with the immutable laws of mechanics and with arithmatical precision, I think that the argument might well be unanswerable. But in spite of the wonders of modern medical science, even at a post-mortem not everything is known about an individual human being. The judge said that it was not possible to explain how the injury happened".

[126] Jones 1998 *PN* 180.

Jones opines that the combined effect of **Ratcliffe** and **Delaney** demonstrates the limited utility of the doctrine in medical negligence cases. In this regard he says:

> "It has long been the case that simply because a plaintiff is in a position to invoke *res ipsa loquitur* the action will not necessarily succeed. A *prima facie* inference of negligence may be rebutted by evidence adduced by the defendant which gives a plausible explanation of how the accident occurred without negligence on his part, or which persuades the court that the defendant exercised reasonable care, even if the consequence of accepting this is that there is simply no explanation for the plaintiff's injury. Considerable emphasis is placed upon the inherent risks of medical treatment, and the fact that the plaintiff's injuries are simply inexplicable will not be treated as a reason for concluding that the defendant must have made a culpable error. In the context of medical claims *res ipsa* has very little to say about the character of the defendant's conduct-indeed, it is positively taciturn" [127].

In **Ratcliffe** Hobhouse LJ also pointed out that *res ipsa loquitur* would rarely be relevant in a medical case since very few medical cases are brought to trial without full discovery having been made, witness statements having been exchanged and expert reports lodged. In this sense the trial opens, not in a vacuum of evidence and explanation, but with expert evidence on both

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[127] Jones 1998 *PN* 182-183.

sides and defined 'battle-lines' drawn. It would therefore seem that the most important function of the application of the doctrine to a medical negligence case is to enable the plaintiff who is not in possession of all the material facts to be able to plead an allegation of negligence in an acceptable form which forces the defendant to respond to that plea acceptably or face the risk of a finding of negligence against him [128].

3.9 SYNOPSIS

3.9.1 INTRODUCTION

Legal opinion and reported authorities support certain well-established principles with regard to the application of the doctrine of *res ipsa loquitur* to the law of tort in general and to medical negligence cases in particular with regard to the following issues:

1.1 the requirements for the application of the doctrine;

1.2 the nature of the doctrine;

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[128] See also: Cameron *Medical Negligence* (1983) 25ff; Dugdale *et al* 15.25ff; Weiler 22ff; Jackson and Powell 480ff; Powers and Harris 18ff; Nelson-Jones and Burton 77ff; Khan and Robson *Medical Negligence* (1997) 188ff; Healy 195ff.

1.3 the effect of the doctrine on the *onus* of proof;

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:

3.10 THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE

3.10.1 NEGLIGENCE

1. The accident must be one which would not in the normal course of events have occurred without negligence [129].

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[129] **Scott v St Katherine's Docks Co supra 596**; **Saunders v Leeds Western Health Authority supra 255**; **Ratcliffe v Plymouth & Torbay HA supra 169**.

2. The accident itself must justify the inference of negligence and in this regard all the circumstances must be considered in the light of common experience and knowledge [130].

3. The plaintiff is permitted to buttress his testimony with expert evidence to the effect that such an accident would not have occurred without the defendant's negligence [131].

3.10.2 MANAGEMENT AND CONTROL

1. The instrumentality which causes the damage or injury must be within the exclusive control of the defendant or of someone for whose actions the defendant is responsible [132].

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[130] **Byrne v Boadle supra 722**; **Skinner v LB & SC Ry supra 788 Chaprioniere v Mason supra 633**; **Fosbrooke-Hobbes v Airwork Ltd supra 108**; **Grant v Australian Knitting Mill supra 85**; **Sochachi v Sas supra 344**; **Fish v Capur supra 176**; **Mahon v Osborne supra 14**; **Cassidy v Ministry of Health supra 343**; **Roe v Ministry of Health supra 131**; **Bennett v Chemical Construction supra 823**; **Stafford v Conti Commodity Services supra 691**.
[131] Rogers 259; **Ratcliffe v Plymouth & Torbay HA supra 169**.
[132] Lall 1974 *NLJ* 216; Rogers 189; Brazier 260.

2. An independent contractor employed by the defendant has control provided that the circumstances are such that the defendant will be liable for the contractor's negligence or the circumstances are such that he must supervise the contractor [133].

3. It is not necessary that all events and circumstances surrounding the accident be under the defendant's control but where the circumstances leading up to the accident are under the control of others besides the defendant, the occurrence alone, is not sufficient evidence against the defendant [134].

4. Where the instrumentality is under the control of several employees of the same employer and the plaintiff is unable to point to a single employee who is in control, the doctrine can still be invoked as to make the employer vicariously liable [135].

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[133] **Jones v Dunlop supra 730**; **Morris v Winsbury-White supra 494**; **Walsh v Holst & Co supra 800**; **Kealy v Heard supra 873**.

[134] **Chaprioniere v Mason supra 633; McGowan v Stott supra 217**; **Grant v Australian Knitting Mills supra 85**; **Moore v R Fox and Sons supra 596**; **Easson v LNE Ry supra 425**; **Morris v Winsbury-White supra 494**; **Lloyde v West Midlands Gas Board supra 1242**; **Duval v Anka Builders supra 28**; **Pritchard v Clwyd CC supra 21**.

[135] **Mahon v Osborne supra 14**;**Voller v Portsmouth Corporation supra 264**; **Cassidy v Ministry of Health supra 574**; **Clarke v Worboys supra 18 March 1952**; **Roe v Minister of Health supra 66**; **Bentley v Bristol and Weston Health Authority supra 1**; **Bull v Devon supra 117**; **Boutcha v Swindon Health Authority supra 62**; **Leckie v Brent and Harrow Health Authority supra 634**.

3.10.3 ABSENCE OF EXPLANATION

1. As soon as the cause or causes of the accident are known the occurrence ceases to be one where the facts speak for themselves and the plaintiff has to establish negligence in relation to the cause [136].
2. A plaintiff who can only present a partial explanation of how the accident occurred is not precluded from relying on the doctrine for further inferences to advance his case [137].

3.11 THE NATURE OF THE DOCTRINE

Res ipsa loquitur is considered to be no more than a convenient label to describe circumstances where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident in itself is considered to be sufficient to establish negligence in the absence of an acceptable explanation by the defendant [138].

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[136] **Flannery v Waterford and Limerick Rly Co supra 30**; **Milne v Townsend supra 830**; **McAthur v Dominion Cartridge Co supra 72**; **Farrel v Limerick Corp supra 169**; **Barkway v South Wales Transport Co Ltd supra 392; Bolton v Stone supra 850**; **Brophy v JC Bradfield and Co Ltd supra 286**; **Hay v Grampian Health Board 128**.
[137] **Ballard v North British Rly Co supra 43**; Foster 1996 *SJ* 824 (contra).
[138] **Lloyd v West Midlands Gas Board supra 1246**.

3.12 *ONUS* OF PROOF

In English law there are two conflicting views with regard to the effect of the invocation of the doctrine on the *onus* of proof:

One of the conflicting views is that the successful invocation of the doctrine raises a *prima facie* inference of negligence which requires the defendant to raise some reasonable explanation as to how the accident could have occurred without negligence. On this basis the burden of proof does not shift to the defendant and if the probabilities are evenly balanced after the evidence of the defendant the plaintiff will not succeed [139].

The alternative view entails the reversal of the burden of proof which requires the defendant to establish that the accident was not caused by his negligence [140].

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[139] **Barkway v South Wales Transport supra 392**; **Ng Chun Pui v Lee Chuen Tat supra 298**; **Ratcliffe v Plymouth & Torbay HA supra 162**.

[140] **Moore v R Fox and Sons supra 596**; **Ward v Tesco Stores supra 219**. The prevailing view seems to be the approach adopted by the Court of Appeal in **Ratcliffe**.

3.13 THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL

In order to rebut the *prima facie* inference of negligence the defendant's explanation in rebuttal should in general comply with the following principles:

1. The defendant may attempt to directly controvert the plaintiff's allegations of fact by proving that he took all reasonable care. In this regard it has been held that it is not enough for the defendants merely to show that the accident could have happened without negligence on their part but also that they had taken all reasonable precautions to ensure that the accident did not happen [141].

2. The defendant may also tender direct evidence as to an alternative cause for the accident which is inconsistent with negligence on his or her part [142].

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[141] **Moore v R Fox and Sons supra 597**; **Esso Petroleum Co Ltd v Southport Corporation supra 218**; **Delaney v Southmead HA supra 355**.
[142] **Ballard v North British Railway Co supra 45**; **Langham Wellingborough School supra 513**; **Ritchie v Chichester HA supra 187**; **Hay v Grampian Health Board supra 128**.

3. The defendant's explanation must be reasonable and he is not entitled to rely on conjecture or speculation, nor will the inference of negligence necessarily be rebutted where the explanation is a remote or unusual eventuality [143].

4. The plaintiff is not required to disprove unlikely or improbable explanations which seek to absolve the defendant [144].

5. The defendant is not required to prove that his explanation is more probable to be correct than any other explanation [145].

3.14 CONCLUSION

The present judicial position with regard to the invocation of the doctrine of *res ipsa loquitur* appears to be that while it enjoys application to medical

[143] **Ballard v North British Railway Co supra 43; Moore v R Fox and Sons supra 596**; **Colevilles v Devine supra 53**; **Holmes v Board of Trustees of the City of London supra 67**; **Ratcliffe v Plymouth and Torbay HA supra 172**.
[144] **Bull v Devon Health Authority supra 117**.
[145] **Ratcliffe v Plymouth and Torbay HA supra 162**.

negligence cases its value is seldom conclusive. It seems that the utility of the application of the doctrine to medical negligence cases is that it preventsa defendant from avoiding responsibility by simply electing not to give evidence under circumstances where he knows or ought to know what happened. Without the power to draw inferences of negligence afforded to the court by applying the doctrine, it (the court) would be denied the evidence of the defendant in some cases, which in turn would render the court powerless to investigate the case to the full.

While it is perfectly understandable that the courts constantly endeavour to contain the principle as far as possible with regard to its application to medical negligence cases because things can and do in fact go wrong in the practice of medicine, however careful and skillful the medical practitioner, it is submitted that it remains an important evidentiary tool in the armoury of a plaintiff who is sometimes unable to identify the operator or technique responsible for his injury. Responsible application of the doctrine in deserving cases prevents possible injustice to a plaintiff while requiring the defendant merely to tender an acceptable explanation.