

## **CHAPTER 5**

### **5.1 CONCLUSION**

### **5.2 A COMPARATIVE ANALYSIS**

#### **5.2.1 ASSIGNMENT**

It is clear from the foregoing exposition of the application of the doctrine of *res ipsa loquitur* to medical negligence cases in the legal systems of South Africa, England and the United States of America that although there is some common ground to be found in their respective applications of the doctrine, vast differences with regard to issues such as the requirements for – nature and procedural effect of- and the explanation in rebuttal, exist. Whereas South African courts have consistently and steadfastly declined to apply the doctrine to medical negligence cases, it has found limited application in England and more liberal application in the United States of America.

In the USA substantial differences also exist with regard to the approaches

adopted by the different States in respect of the application of the doctrine so that it becomes problematic to postulate a logical framework or to establish a completely meaningful standard from which to work from.

As a result of the substantial differences of approach between the three legal systems, a comparative analysis invites, if not constrains, the outlining of a broader perspective where it becomes necessary to generalise to a certain extent. Nevertheless, an attempt is made to highlight the similarities and the differences with regard to the various approaches adopted by the three legal systems, in an endeavour to establish at least some common ground from which firmer conclusions may be drawn.

Inasmuch as it appears that the relevant case law of the three respective legal systems seems to be more representative of the legal practice relating to the application of the doctrine, in contrast to the diverging legal opinions of commentators on the subject, the relevant legal principles are expounded with reference primarily to case law supported by concurring legal opinion which occasionally may result in the negation of dissenting if not deserving commentaries on the subject matter.

### **5.3. THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE**

#### **5.3.1. NEGLIGENCE**

#### **5.3.2. Similarities**

Common to all three legal systems is the requirement that the accident must be one which would not in the normal course of events have occurred without negligence. The accident itself must justify the inference of negligence and in this regard the occurrence must be considered in the light of common experience and knowledge.

#### **5.3.3 Differences**

##### **South Africa**

In South Africa the occurrence should be indicative of a high probability of negligence which must be based on the occurrence alone, without reference to the surrounding circumstances of the case. The inference of negligence is also only permissible while the cause remains unknown. It appears as if the denial of the doctrine's application to medical negligence cases is based on the notion that the nature of any medical intervention is so complex that the

surrounding circumstances must always be considered.

### **England**

As in South Africa the English courts require that the actual cause of the accident must be unknown. This requirement although stated independently, is however watered down to the extent that a plaintiff who can present only a partial explanation of how the accident occurred is not precluded from relying on further inferences to advance his case <sup>1</sup>. The plaintiff is also permitted to buttress his case with expert evidence to the effect that the matter complained of does not ordinarily occur in the absence of negligence.

### **United States of America**

In the USA the common knowledge requirement has been liberalised to the extent that some courts allow the plaintiff to both introduce evidence of specific acts of negligence and to rely on the doctrine of *res ipsa loquitur*. In medical context the plaintiff is permitted to present expert medical testimony

---

<sup>1</sup> See however Foster (contra) supra 95 fn 26.

with regard to negligence and also to present expert evidence relating to the question as to whether the accident was one which would ordinarily not occur in the absence of negligence. Courts have also allowed the plaintiff not just to avoid a nonsuit by applying the doctrine but also to request and receive a *res ipsa loquitur* jury instruction. In terms of this liberalization the plaintiff is able to avoid a nonsuit and invite the jury to draw an inference of negligence against the defendant via the *res ipsa* instruction. Where the plaintiff does not provide a full and complete explanation of the occurrence it does not destroy the inferences which are consistent with the evidence and thus evidence of specific acts of negligence does not deprive him of the benefit of *res ipsa loquitur*.

#### **5.4. MANAGEMENT AND CONTROL**

##### **5.4.1. Similarities**

A further requirement which is common to all three legal systems is the condition that the instrumentality, causing the injury, must be under the exclusive control of the defendant or of someone for whose actions the defendant is responsible.

## **5.4.2. Differences**

### **South Africa**

In South Africa, where a plaintiff sues multiple defendants and at the close of his case there is evidence, upon which the court could hold either or any defendant liable, the court should not grant absolution of the instance in favour of either or any defendant. A defendant who thereafter chooses not to tender any evidence in exculpation runs the risk of judgment being granted against him. If the evidence against multiple defendants are inconclusive to the extent that the court is unable to decide on a balance of probabilities whether either or any defendant was negligent, the only appropriate order would be one of absolution from the instance.

### **England**

In England 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. 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. 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 to render the employer vicariously liable.

### **United States of America**

Some jurisdictions have adopted the approach that *res ipsa loquitur* requires nothing more than evidence from which it could be established that the event was of a kind which does not ordinarily occur without negligence and that the negligence which caused the event was probably that of the defendant. Although the majority of jurisdictions support the view that the doctrine of *res ipsa loquitur* does not find application to multiple defendants courts have applied the doctrine to multiple medical defendants who had concurrently exercised control over medical instrumentalities.

## **5.5 CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF**

### **United States of America**

In the USA one of the independent requirements for the application of the

doctrine is an absence of any act or omission on the part of the plaintiff which contributes to the occurrence so that the plaintiff does not recover damages for injuries for which he himself is responsible. The advent of comparative fault acts in the USA converted the plaintiff's contributory fault from a traditional total barring of the doctrine to one of reducing damages to the *pro rata* degree of fault of the plaintiff.

### **South Africa**

In South Africa a plaintiff can rely on the doctrine of *res ipsa loquitur* in spite of his own negligence provided that the defendant's negligence proclaims such negligence <sup>2</sup>.

### **England**

In England where damage is attributable partly to the fault of the defendant and partly to the fault of the plaintiff the plaintiff's damages will be reduced to the extent the court considers just and equitable having regard to the plaintiff's share in responsibility for the damage <sup>3</sup>. It is submitted that the plaintiff would similarly be permitted to rely on the doctrine of *res ipsa loquitur* under such circumstances.

---

<sup>2</sup> **Burger v Santam 1981 2 SA 703 (A).**

<sup>3</sup> Jones 160.



## **5.6 EVIDENCE MUST BE MORE ACCESSIBLE TO DEFENDANT**

### **United States of America**

Some jurisdictions in the USA require a further independent controversial condition for the application of the doctrine to the effect that that the evidence must be more accessible to the defendant. This requirement is not considered indispensable and has found limited application in medical context.

### **South Africa and England**

Both in South Africa and England there is no similar requirement for the application of the doctrine.

## **5.7 THE NATURE OF THE DOCTRINE**

### **5.7.1 Similarities**

Common to all three jurisdictions <sup>4</sup> the nature of the doctrine is regarded as a

---

<sup>4</sup> This approach is followed by the majority of courts in the USA and also appears to be the current approach of the Court of Appeal in England (Ratcliffe case).

form of circumstantial evidence which permits but does not compel an inference of negligence. As a result of divergent approaches with regard to the procedural effect of the doctrine in England as well as in the USA, the differences of such approaches will obviously effect the nature of the doctrine relative to the respective approach.

## **5.8 THE *ONUS* OF PROOF**

### **5.8.1 Similarities**

Common to all three legal systems, one of the approaches with regard to the procedural effect of the application of the doctrine of *res ipsa loquitur* on the *onus* of proof is that the burden of proof does not shift to the defendant and if the probabilities are equal after the evidence of the defendant the plaintiff will not succeed.

### **5.8.2 Differences**

#### **South Africa**

In South Africa it is settled law that the *onus* of proof without exception remains throughout the case on the plaintiff and never shifts.

## **England**

In English law there is two divergent approaches as to the procedural effect of the application of the doctrine on the *onus* of proof. In terms of the first approach the application 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 *onus* 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. The alternative approach entails the reversal of the burden of proof which would require the defendant to establish that the accident was not caused by his negligence.

## **United States of America**

In the United States of America there are no less than three divergent approaches as to the procedural effect of the doctrine on the *onus* of proof. In terms of the first approach, followed by the majority of jurisdictions, the jury is permitted but not compelled to infer negligence from the plaintiff's case and has the effect of satisfying the burden which rests on the plaintiff to

introduce evidence upon which reasonable men may find in his favour so as to avoid a nonsuit or a dismissal since there is sufficient evidence to go to the jury.

The *onus* of proof is not shifted to the defendant nor is there an obligation on him to move forward with the evidence. The second approach (the presumption approach) entitles the jury to infer negligence against the defendant and in the absence of exculpatory evidence by the defendant the court will require the jury to do so and also entitle the plaintiff to a directed verdict. The burden of going forward with the evidence is placed on the defendant but this does not mean that the defendant is required to produce evidence of a greater weight than the plaintiff. If the probabilities are equal after the evidence of the defendant is in, the verdict must be for the defendant.

In terms of the third approach the *onus* of proof is shifted to the defendant who is then required to prove on a preponderance of the evidence that the injury was not suffered as a result of his negligence. Exclusive to some jurisdictions the so-called conditional *res ipsa loquitur* permits the jury to first establish whether the requirements for the application of the doctrine have been met. If their conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine.

In some jurisdictions the application of the doctrine is regulated by statute. A number of these statutes have limited or abolished the application of the doctrine in medical negligence cases.

## **5.9 THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL**

### **5.9.1 Similarities**

Common to all three legal systems with regard to the nature of the defendant's explanation in rebuttal are the following:

1. Depending obviously, on the specific approach adopted with regard to the procedural effect on the *onus* of proof it appears that the defendant runs the risk of judgment being granted against him if he elects not to tender any evidence in rebuttal.
2. If the defendant does elect to give evidence the inference of negligence is neutralised by either producing direct evidence as to an alternative cause for the accident which is inconsistent with negligence on his part or the defendant may lead evidence to the effect that he, at the time, had taken all reasonable precautions.
3. Depending, once again on the approach adopted by the court with regard to the procedural effect of the application of the doctrine on

the *onus* of proof the defendant is not required to prove that his exculpatory explanation is more probable to be correct than any other explanation.

## 5.9.2 Differences

### South Africa

Where the taking of a precaution by the defendant is the initial and essential factor in the explanation of the occurrence and the explanation is accessible to the defendant and not the plaintiff, the defendant must produce sufficient evidence to displace the inference that the precaution was not taken. The nature of the defendant's reply is therefore dependent on the relative ability of the parties to contribute evidence on the issue. The degree of persuasiveness required by the defendant will vary according to the general probability or improbability of the explanation. If the explanation is regarded as rare and exceptional in the course of human experience much more would be required by way of supporting facts but if the explanation on the other hand can be regarded as an ordinary everyday occurrence the court should guard against the possibility that the explanation was advanced 'glibly'

because of the very frequency of the occurrence it seeks to describe. The explanation of the defendant will be tested by considerations such as probability and credibility.

### **England**

Where the defendant attempts to controvert the inference of negligence by showing that he took all reasonable care he must also show that he had taken all reasonable precautions to ensure that the accident did not happen. The defendant's explanation must be reasonable and he is not entitled to rely on conjecture and speculation, nor will the inference of negligence necessarily be rebutted where the explanation is a remote or unusual eventuality. The plaintiff is not required to disprove unlikely or improbable explanations which seek to absolve the defendant.

### **United States of America**

The nature of the defendant's evidence to neutralize any reasonable inference is dependent on the strength of the inference and if a defendant convincingly shows that the accident was caused by some outside agency over which the defendant had no control or either, that the occurrence

commonly occurs without negligence on the part of anyone or that it could not have been avoided by the exercise of all reasonable care, he is entitled to a directed verdict in his favour. Where the defendant's evidence is to the effect that he exercised all reasonable care, it may not be sufficient to attract a directed verdict in his favour unless the proof of proper care is so overwhelming that it destroys the inference created by the invocation of the doctrine.

## **5.10 CRITICAL EVALUATION**

### **5.10.1 ASSIGNMENT**

A critical evaluation of the three legal systems with regard to the application of the doctrine of *res ipsa loquitur* assumes a problematic nature due to the widely diverging and constantly conflicting approaches not only, as in some instances, in the same legal system, but also between the three legal systems *inter se*. A critical analysis must therefore be based on a generalized broad perspective where it is only logically practicable to expound the more prominent features by way of reference to the similarities and differences



which are highlighted in the comparative survey. Where applicable, reference is also made to related issues in so far as such issues are not addressed with sufficient particularity elsewhere.

### **5.10.2 THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE**

### **5.10.3 NEGLIGENCE**

### **5.10.4 COMMON KNOWLEDGE AND ORDINARY EXPERIENCE**

Although the ‘common knowledge and ordinary experience’ requirement is common to all three legal systems, its parameters are differently defined and it is also differently applied by each respective legal system. In South Africa the alleged negligence must depend on so-called ‘absolutes’. This means that the occurrence itself, must be of such a nature that if the ‘common knowledge or ordinary standard’ is applied, it (the occurrence) would not

have happened without negligence. Thus, if the foregoing assessment cannot be made by having regard to the occurrence alone, so that the surrounding circumstances must also be considered in order to arrive at a conclusion, *res ipsa loquitur* does not find application. This appears to be the reason why South African courts decline to apply the doctrine to medical negligence cases, based on the notion that the medical interventions which form the subject of the dispute, do not fall within the ordinary experience of mankind, because a court would usually be unable to draw a conclusion without the benefit of expert medical evidence.

In England this requirement is liberalized to the extent that it allows the plaintiff to call expert witnesses to testify that, according to their expert medical opinion, the accident would not have occurred in the absence of the defendant's negligence. The courts also allow the plaintiff to rely on the doctrine for further inferences to advance his case even under circumstances where the plaintiff is able to provide a partial explanation for the accident. Certain jurisdictions in the USA go even further by not only allowing

plaintiff to present expert evidence in tandem with the application of the doctrine, but also to allow the presentation of expert evidence of specific acts of negligence together with the evidence of the rare occurrence.

The approach of the South African courts with regard to the application of the doctrine to medical negligence cases and more specifically the view that medical procedures, are, *per se*, usually of such a complicated nature that such procedures fall outside the realm the common knowledge and ordinary experience of mankind, is clearly not only erroneous but also dogmatic and outdated. The post-operative retention of surgical products, the erroneous amputation of a healthy limb or the administration of the wrong drug dosage, all represent examples of medical accidents which clearly and comfortably fall within the common knowledge of the reasonable man. The notion that the consideration of every medical accident requires an investigation of all the surrounding circumstances is without merit and falls to be rejected.

Once the principle is established that some medical procedures do indeed fall within the common knowledge and experience of a reasonable man the only outstanding issue is where to draw the line. Whereas the approach of

the South African courts in this regard is obviously too conservative the approach adopted by certain jurisdictions in the USA to the effect that the plaintiff is permitted to apply the doctrine and present expert evidence as to specific acts of negligence and the occurrence itself is probably too liberal. It would appear that the approach adopted in England, to the effect that the plaintiff is permitted to buttress his case with expert evidence to the effect that the occurrence complained of should not have taken place if due care had been exercised, assumes a moderate stance which adequately caters for both the interests of the plaintiff and the defendant.

It would also appear as if a distinction should be drawn between cases where certain foreseen (high risk) complications or medically inexplicable results ensue and cases where the nature of the complication can be considered as being completely alien to the treatment which was administered. Where, for example, a perfectly otherwise healthy, fourteen year old patient, undergoes a routine uncomplicated and relatively risk free medical intervention such as a tonsillectomy under general anaesthetic and suddenly suffers an intra-operative cardiac arrest, it is submitted that the state of modern medical science, combined with highly advanced medical technology, invite the

inevitable assumption, even from the perspective of a medical layman ,that the complication more probably than not resulted from some negligent conduct.

It is facile to argue that as anaesthetic procedures are regarded as complicated procedures even within the medical fraternity, such procedures cannot possibly fall within the ordinary experience of mankind. By way of analogy it is similarly facile to argue that the mechanics of the steering-mechanism of a modern motorvehicle cannot possibly fall within the knowledge of the ordinary layman, yet South African courts are for example prepared to apply the doctrine to cases where a motorvehicle skids onto its incorrect side of the road. Such a skid may, for the sake of argument, have been caused by mechanical failure of the steering- or braking mechanisms of the vehicle. Common sense, however, dictates that the skidding onto the incorrect side of the road is usually attributable to driver error, hence the application of the doctrine. Applied to the medical context it is therefore not so much the relevant medical procedure which falls within the common knowledge of the layman but rather the extremely rare result which is not supposed to follow if due care had been exercised.

It is submitted that the approach followed in the English case of **Ratcliffe**<sup>5</sup> makes provision for obvious medical blunders as well as more complex matters where the plaintiff is permitted to buttress the evidence which establishes the *res* with expert evidence. Not only does such an approach alleviate the plaintiff's burden of proof but also provides adequate protection for the defendant by endorsing the principle of honest doubt, in the form of having sympathy for the defendant and letting him prevail if he comes to court and explains that untoward results do in fact sometimes occur, despite due care, under circumstances where it is not always possible to identify the exact cause of the injury.

#### **5.10.5 MANAGEMENT AND CONTROL**

The requirement of management and control which is common to all three legal systems usually presents little difficulties where only one defendant is involved. It is in modern surgical settings where ' a complex organization of highly specialized, independent and interrelating members of the surgical process and pre- and postoperative periods of care are involved', that the control element may become problematic if liability cannot be established

---

<sup>5</sup> See 153 *supra*.

vicariously or by way of agency. In South Africa the courts have not as yet had to decide what form of control in medical context would be sufficient to satisfy this requirement when the doctrine of *res ipsa loquitur* is applied. It appears however that if a patient is under the care of several people at the same time, it would be of extreme importance to ascertain, firstly, who was responsible for the mishap. Thereafter consideration would have to be afforded as to what extent any other member of the 'team' could be held liable for the actions of that person. In England a similar type of approach prevails. Both in South Africa and England in the context of multiple defendants, it appears that the plaintiff can call upon each defendant to explain the circumstances after he has established a *prima facie* case. The approach of the South African courts not to grant an application for absolution from the instance in favour of either or any defendant (thereby affording an opportunity to all the parties to place whatever evidence they choose to tender before the court), appears to be just and equitable.

The **Ybarra**<sup>6</sup> approach which is followed in some jurisdictions in the USA to the effect that an initial burden of explanation is placed on every defendant in whose care the plaintiff was during the relevant period may

---

<sup>6</sup> See 198-201 216ff supra.

result in the imposition of liability on blameless defendants if the defendants are unable to determine among themselves, who the negligent party is.

#### **5.10.6 CONTRIBUTORY NEGLIGENCE AND ACCESSIBILITY TO EVIDENCE**

In the USA the application of the doctrine was initially barred if the plaintiff's conduct contributed to his injury (damages). Comparative fault acts have converted the plaintiff's fault to a reduction of damages in accordance with the *pro rata* degree of his fault. In both South Africa and England the plaintiff can rely on the doctrine despite his possible contributory negligence which in both cases will reduce his damages in accordance with his *pro rata* neglect.

The controversial further independent requirement in some American jurisdictions to the effect that the evidence must be more accessible to the defendant should not be supported on a general basis. It is however important when considering the strength of the inference to be drawn to have regard to the relative ability of the parties to contribute evidence on the



issue, particularly when the defendant elects not to tender any evidence. A failure to produce evidence where a defendant is in fact in a position to do so may elevate the plaintiff's *prima facie* proof to conclusive proof.

### **5.11 THE NATURE OF THE DOCTRINE AND ITS PROCEDURAL EFFECT ON THE *ONUS* OF PROOF**

The approach that the doctrine of *res ipsa loquitur* is not a presumption of law but merely a permissible inference of negligence which the court may, but is not compelled to draw from the circumstances of an accident, is common to all three legal systems and appears to describe the nature of the doctrine correctly. In terms of this approach the burden of proof remains on the plaintiff throughout the trial and is in accord with the traditional evidentiary principles relating to the law of tort (delict in the South African context). In terms of this approach the successful application of the doctrine establishes a *prima facie* case and its strength will obviously depend on the particular facts of the case.

Where the application of the doctrine creates an inference and not a presumption of negligence or a formal shifting of the *onus* of proof, the

defendant is only required to 'rebalance the scales of proof' so that it is quite possible that the defendant might prevail, despite electing not to produce an exculpatory explanation where for example, despite the inference of negligence, supported by any other circumstantial evidence the court still considers the evidence as a whole to be insufficient to elevate the *prima facie* proof to a conclusive case.

Applied in medical context, it appears as if the nature of the circumstances surrounding the usual medical accident is such, that the defendants are almost without exception in a position, where the facts giving rise to the accident are not only within their knowledge (unless, of course, the result is extremely rare or impossible to explain) but also usually supported by accurate documentary medical record keeping. This being so, it is submitted that the *prima facie* case established by the application of the doctrine, represents evidence capable of being supplemented by negative inferences drawn from the defendant's failure to reply. An all important aspect of the aforesaid approach is the relative ability of the parties to contribute evidence on the issue.

The defendants in a medical negligence action should relatively speaking, usually be in a better position to contribute evidence for the reasons already stated and the fact that the patient is more often than not, unconscious or anaesthetised while undergoing the medical intervention. A failure by the defendant to provide an explanation under these circumstances should invite a negative inference which together with the inference of negligence established by the application of the doctrine should be sufficient to establish conclusive proof.

The alternative approaches relating to the effect of the application of the doctrine on the burden of proof, namely the presumption of negligence or even the formal shifting of the burden of proof to the defendant, is in conflict with the traditional evidentiary principles relating to the law of tort and should be rejected. A formal shifting of the burden of proof to the defendant in a medical negligence action is akin to the imposition of a form of strict liability which would require the defendant to vindicate himself conclusively under circumstances where for example, an extremely rare complication develops which is unavoidable or impossible to explain. It is submitted that it would be unjust and unreasonable to impose such an onerous burden on

a professional person who is confronted on a daily basis, with the very real and cogent difficulties presented by the practice of an inexact science such as medicine.

## **5.12 THE NATURE OF THE EXPLANATION IN REBUTTAL**

The nature of the defendant's explanation in rebuttal is obviously dependent on the question as to whether the defendant is confronted by a *prima facie* inference of negligence, a presumption of negligence or a formal shifting of the burden of proof. In advocating the 'inference of negligence' approach it is submitted that the defendant's explanation should conform with the following basic principles:

1. The defendant's explanation should be a plausible one and not just consist of mere theories or hypothetical suggestions nor should the defendant be permitted to rely on speculation or conjecture.
2. The explanation should have some substantial foundation in fact and the evidence produced must be sufficient to rebut the inference of negligence created by the application of the doctrine.

3. The plaintiff should not be required to disprove every unlikely or improbable explanation which seeks to absolve the defendant.
4. The explanation offered by the defendant should be tested by considerations such as probability and credibility but there is no *onus* on the defendant to establish his explanation on a balance of probabilities. If the explanation is indicative of facts which are equally consistent with absence of negligence as with negligence, the inference should be rebutted.
5. An explanation to the effect that the defendant exercised all reasonable care and that all reasonable precautions were taken to prevent an accident should be sufficient to rebut the inference.
6. Where the defendant, in the light of the common state of medical knowledge, is unable to explain an extremely rare result or where it is impossible for the defendant to explain the accident, the inference should also be rebutted because of the fact that the plaintiff ultimately still bears the *onus* of proof.
7. If the defendant elects not to tender an explanation in evidence and the circumstances are such that the facts indicate that the defendant is in a position to contribute evidence with regard to the issues, his

silence should entitle the court to supplement the inference of negligence created by the doctrine, with the negative inference created by his failure to testify, so that the *prima facie* case, becomes conclusive.

### **5.13 SYNOPSIS**

#### **South Africa**

Compared to the other two legal systems, there is more legal clarity with regard to the nature, requirements for and especially the effect of the application of the doctrine on the *onus* of proof. The only approach followed by the courts is that the doctrine of *res ipsa loquitur* is a permissible factual inference which the court is at liberty but not compelled to make and which does not effect the *onus* of proof, which throughout the trial, remains on the plaintiff. Successful application of the doctrine assists the plaintiff to establish a *prima facie* case only and if the defendant elects to close his case without providing exculpatory evidence, he runs the risk of a judgment being granted against him. It is also quite clear that the plaintiff can only rely on the doctrine if the cause of the accident remains unknown. The nature of the explanation in rebuttal is such that although it should conform to certain

rather stringent principles it is not expected of the defendant to prove his blamelessness on a balance of probabilities. This implies that if, after all the evidence is in, the probabilities are still equal, the defendant should prevail.

## **England**

Although there are two divergent approaches as to the procedural effect of the doctrine of *res ipsa loquitur* in England, the current trend reflected by the Court of Appeal is that the application of the doctrine raises a *prima facie* inference of negligence which may require the defendant to raise some reasonable explanation as to how the accident could have occurred without negligence. On this basis the *onus* of proof similarly does not shift to the defendant and if the probabilities are evenly balanced after the evidence of the defendant, the plaintiff will fail.

With regard to the application of the doctrine to medical negligence cases the plaintiff is permitted to buttress the inference of negligence created by the doctrine, by leading expert testimony to the effect that the accident should not have occurred if due care had been exercised. It appears that there

is also some controversy with regard to the question as to whether the plaintiff can still rely on the doctrine when only a part of the cause of the accident is known. The defendant's explanation in rebuttal should similarly comply with certain well-established principles but he is also not required to prove his explanation on a preponderance of the evidence.

### **United States of America**

In the United States of America much more controversy reigns with regard to the nature, requirements for and the procedural effect of the application of doctrine on the *onus* of proof. Three divergent views co exist with regard to the procedural effect of the application of the doctrine. In terms of the approach followed by the majority of jurisdictions the jury is permitted but not compelled to infer negligence from the plaintiff's case, which has the effect of satisfying the burden which rests on the plaintiff to introduce evidence upon which reasonable men may find in his favour so as to avoid a nonsuit or dismissal since there is sufficient evidence to go to the jury.



In contrast to the legal systems in South Africa and England the requirements for the application of the doctrine to medical negligence cases have been modified to a certain extent and is considered as a more natural employment of the doctrine through adaptation to a particular field of litigation. In some jurisdictions the plaintiff is permitted to use expert testimony to help meet the necessary elements of the doctrine to the effect that the injury was probably the result of negligence. The plaintiff is also permitted to lead expert evidence of specific acts of negligence and to rely on the doctrine. In those jurisdictions where plaintiffs are entitled to present expert evidence it is common to plead specific acts of negligence in accordance with expert testimony alternatively to rely on the doctrine with regard to those acts in respect of which it is not clear how they may have occurred.

With regard to the requirement of control the **Ybarra** court permitted the application of the doctrine even though it was clear that not all the defendants had actual control over the plaintiff but rather the ‘right to control’ and that under that standard every defendant had the burden of explaining the cause of the plaintiff’s injury. Another departure from the traditional *res ipsa loquitur* is the notion that if reasonable minds may differ

as to whether the requirements of the doctrine have been met, is to first instruct the jury to determine whether the basic elements have been met, and if so, to then instruct them on the procedural effect of the doctrine. In contrast to South Africa and England the doctrine is also limited by statute in certain jurisdictions.

The inference of negligence approach permits the jury to determine the overall credibility of the plaintiff's case and it does not effect the credibility of the defendant's evidence or overall presentation of his case. If the defendant convincingly shows that the accident was caused by some outside agency over which he had no control or either that the occurrence commonly occurs without negligence on the part of anyone, or that the accident could not have been avoided despite the exercise of all reasonable care, the defendant is entitled to a directed verdict in his favour.