

**THE APPLICATION OF THE DOCTRINE OF *RES IPSA*
LOQUITUR TO MEDICAL NEGLIGENCE CASES:
A COMPARATIVE SURVEY**

by

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TABLE OF CONTENTS

PREFACE	XV
SUMMARY (ENGLISH)	XVII
SUMMARY (AFRIKAANS)	XX
CHAPTER 1	
1.1 GENERAL INTRODUCTION	1
1.2 PURPOSE	7
1.3 CHOICE OF LEGAL SYSTEM	7
1.4 METHODS	9
CHAPTER 2	
THE APPLICATION OF THE DOCTRINE OF <i>RES IPSA</i> <i>LOQUITUR</i> TO MEDICAL NEGLIGENCE CASES IN SOUTH AFRICA	
2.1 INTRODUCTION	13
2.2 THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN SOUTH AFRICA	15
2.3 REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE IN SOUTH AFRICAN LAW	18
2.3.1 Introduction	18

2.3.2	Negligence	19
2.3.3	Control of the instrumentality	22
2.4	THE EFFECT OF THE APPLICATION OF THE DOCTRINE ON THE <i>ONUS</i> OF PROOF	23
2.4.1	Introduction	23
2.4.2	<i>Res ipsa loquitur</i> and circumstantial evidence	23
2.4.3	<i>Onus</i> of proof	28
2.4.4	The nature of the defendant's explanation in rebuttal	30
2.5	MEDICAL NEGLIGENCE CASES	37
2.5.1	Introduction	37
2.5.2	Case law	40
2.5.3	LEGAL OPINION	59
2.5.3.1	Introduction	59
2.5.3.2	The majority judgment in <i>Van Wyk v Lewis</i>	60
2.5.3.3	Critical analysis of the majority judgment	65
2.5.3.4	Introduction	65
2.5.3.5	The evidence of Dr Lewis	65
2.5.3.6	Conclusion	68
2.6	SYNOPSIS	74

2.6.1	INTRODUCTION	74
2.6.1.1	The requirements for the application of the doctrine	74
2.6.1.2	Negligence	75
2.6.1.3	Control	76
2.7	THE NATURE OF THE DOCTRINE	76
2.8	ONUS OF PROOF	76
2.9	THE NATURE OF DEFENDANT'S EXPLANATION IN REBUTTAL	77
2.10	CONCLUSION	80

CHAPTER 3

THE APPLICATION OF THE DOCTRINE OF *RES IPSA*

LOQUITUR TO MEDICAL NEGLIGENCE

CASES IN ENGLAND

3.1	INTRODUCTION	82
3.2	THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN ENGLAND	84
3.3	REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE IN ENGLISH LAW	90
3.3.1	Introduction	91
3.3.2	Negligence	91

3.3.3	Management and control	92
3.3.4	Absence of explanation	94
3.4	THE EFFECT OF THE APPLICATION OF THE DOCTRINE ON THE <i>ONUS</i> OF PROOF	96
3.4.1	Introduction	95
3.4.2	<i>Res ipsa loquitur</i> and circumstantial evidence	95
3.4.3	<i>Onus</i> of proof	97
3.5	THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL	99
3.6	MEDICAL NEGLIGENCE	103
3.6.1	Introduction	103
3.7	CASE LAW	105
3.7.1	Introduction	105
3.7.2	Retained surgical products	106
3.7.3	Anaesthetic procedures	114
3.7.4	General surgical procedures	125
3.7.5	Dental procedures	134
3.7.6	Injections	138
3.7.7	Infection	140
3.7.8	Duty of care	142

3.8	LEGAL OPINION	145
3.8.1	Introduction	145
3.8.2	Advantage for the plaintiff	147
3.9	SYNOPSIS	159
3.9.1	Introduction	159
3.10	THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE	160
3.10.1	Negligence	160
3.10.2	Management and control	161
3.10.3	Absence of explanation	163
3.11	THE NATURE OF THE DOCTRINE	163
3.12	ONUS OF PROOF	164
3.13	THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL	165
3.14	CONCLUSION	167

CHAPTER 4

THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE CASES IN THE UNITED STATES OF AMERICA

4.1	INTRODUCTION	168
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4.2	THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN THE UNITED STATES OF AMERICA	171
4.3	REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE	173
4.3.1	Introduction	173
4.3.2	Negligence	174
4.3.3	Control	174
4.3.4	Contributory negligence on the part of the plaintiff	177
4.3.5	Evidence more accessible to the defendant	177
4.4	THE PROCEDURAL EFFECT OF THE APPLICATION OF THE DOCTRINE ON THE <i>ONUS</i> OF PROOF	178
4.4.1	Introduction	178
4.4.2	<i>Res ipsa loquitur</i> and circumstantial evidence	179
4.5	<i>ONUS</i> OF PROOF	180
4.5.1	The permissible inference approach	180
4.5.2	The presumption approach	181
4.5.3	The shifting of the burden of proof approach	182
4.6	THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL	184

4.7	MEDICAL NEGLIGENCE CASES	185
4.7.1	Introduction	186
4.7.2	Doctrinal requirements in medical context	190
4.7.3	Introduction	190
4.7.4	Negligence in medical context	190
4.7.5	Control in medical context	195
4.7.6	Bases for allowing <i>res ipsa loquitur</i> against multiple medical defendants	196
4.7.7	Concurrent control	196
4.7.8	<i>Respondeat superior</i>	196
4.7.9	The <i>Ybarra</i> rule of unallocated responsibility	197
4.7.10	Conditional <i>Res Ipsa Loquitur</i>	201
4.8	ABSENCE OF CONTRIBUTORY NEGLIGENCE IN MEDICAL CONTEXT	203
4.9	EVIDENCE MUST BE MORE ACCESSIBLE IN MEDICAL CONTEXT	203
4.10	STATUTORY REGULATION OF THE DOCTRINE IN MEDICAL CONTEXT	204
4.11	CASE LAW	205
4.11.1	Introduction	205
4.11.2	Retained surgical products	205

4.11.3	Anaesthetical procedures	215
4.11.4	General surgical procedures	232
4.11.5	Dental procedures	240
4.11.6	Injections	241
4.11.7	Infection	246
4.11.8	Duty of care	248
4.12	LEGAL OPINION	250
4.12.1	Introduction	250
4.12.2	Utility of the doctrine in medical negligence cases	251
4.12.3	<i>Res ipsa loquitur</i> , common knowledge and expert medical opinion	253
4.12.4	<i>Res ipsa loquitur</i> and the element of control	257
4.12.5	The conditional <i>res ipsa loquitur</i>	259
4.13	THE PROCEDURAL EFFECT OF THE DOCTRINE	262
4.14	THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL	264
4.15	OVERVIEW OF LEGAL OPINION	266
4.16	SYNOPSIS	274
4.16.1	Introduction	274
4.16.2	The requirements for the application of the doctrine	274

4.16.3	Negligence	274
4.16.4	Control	276
4.16.5	Contributory negligence on the part of the plaintiff	277
4.16.6	Evidence must be more accessible to the defendant	278
4.17	THE NATURE OF THE DOCTRINE	279
4.18	<i>ONUS OF PROOF</i>	279
4.19	THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL	282
4.20	STATUTORY REGULATION OF THE DOCTRINE	283
4.21	CONCLUSION	284

CHAPTER 5

5.1	CONCLUSION	286
5.2	A COMPARATIVE ANALYSIS	286
5.2.1	Assignment	286
5.3	THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE	288
5.3.1	Negligence	288
5.3.2	Similarities	288
5.3.3	Differences	288
	South Africa	288

	England	289
	United States of America	289
5.4	MANAGEMENT AND CONTROL	290
5.4.1	Similarities	290
5.4.2	Differences	291
	South Africa	291
	England	291
	United States of America	292
5.5	CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF	292
	United States of America	292
	South Africa	293
	England	293
5.6	EVIDENCE MUST BE MORE ACCESSIBLE TO DEFENDANT	294
	United States of America	294
	South Africa and England	294
5.7	THE NATURE OF THE DOCTRINE	294
5.7.1	Similarities	294
5.8	ONUS OF PROOF	295
5.8.1	Similarities	295

5.8.2	Differences	295
	South Africa	295
	England	296
	United States of America	296
5.9	THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL	298
5.9.1	Similarities	298
5.9.2	Differences	299
	South Africa	299
	England	300
	United States of America	300
5.10	CRITICAL EVALUATION	301
5.10.1	Assignment	301
5.10.2	The requirements for the application of the doctrine	302
5.10.3	Negligence	302
5.10.4	Common knowledge and ordinary experience	302
5.10.5	Management and control	307
5.10.6	Contributory negligence and accessibility to evidence	309

5.11	THE NATURE OF THE DOCTRINE AND ITS PROCEDURAL EFFECT ON THE <i>ONUS</i> OF PROOF	310
5.12	THE NATURE OF THE EXPLANATION IN REBUTTAL	313
5.13	SYNOPSIS	315
	South Africa	315
	England	316
	United States of America	317

CHAPTER 6

DE LEGE FERENDA RECOMMENDATIONS WITH REGARD TO THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE AND OTHER RELATED MEDICAL MALPRACTICE ISSUES IN SOUTH AFRICA

6.1	INTRODUCTION	320
6.2	WHY SHOULD <i>VAN WYK</i> BE OVERRULED?	322
6.2.1	The court's misdirections relating to the expert medical evidence	322

6.2.2	The court's erroneous reasoning as to the stage at which it should consider whether the requirements for the application of the doctrine have been met	326
6.3	OTHER CONSIDERATIONS WHICH SUPPORT THE APPLICATION OF THE DOCTRINE TO MEDICAL NEGLIGENCE CASES	329
6.3.1	The constitutional principles of equality and the right to a fair trial	329
6.3.2	Policy considerations	331
6.3.3	Modern approaches in other legal systems	331
6.4	<i>DE LEGE FERENDA</i> RECOMMENDATIONS WITH REGARD TO THE APPLICATION OF THE DOCTRINE TO SPECIFIC MEDICAL MALPRACTICE PROCEDURES IN SOUTH AFRICA	332
6.4.1	Civil medical negligence cases	332
6.4.2	Medical inquests	336
6.4.3	Criminal prosecutions	340
6.4.4	Disciplinary inquiries instituted by the Health Professions Council of South Africa	341

6.5	PLEADING <i>RES IPSA LOQUITUR</i> IN MEDICAL NEGLIGENCE CASES	343
6.5.1	General	344
6.5.2	<i>Res ipsa loquitur</i>	345
6.6	CLOSING REMARKS	348
7.	LIST OF ABBREVIATIONS	349
8.	BIBLIOGRAPHY	352
9.	REGISTER OF CASES	359
10.	TABLE OF STATUTES	375

PREFACE

This work was completed in January 2002 and submitted as a doctoral thesis at the University of Pretoria. It assumed a long, sometimes arduous journey through legal minefields in an endeavour to extricate the essence of the highly controversial doctrine of *Res Ipsa Loquitur* as applied to medical negligence cases.

During the research period my initial promotor Ferdinand van Oosten passed away tragically and Prof Carstens kindly agreed to assist and guide me to the finalization of the project. I am extremely grateful for his patience, encouragement and unfailing support throughout.

Special thanks are due to Carl van Rensburg, who obtained a copy of the record of **Van Wyk v Lewis** from the archives of the Supreme Court of Appeal in Bloemfontein, Tommy Prins, Jean Nell and Gillian Coutinho, for their assistance especially with regard to the research in respect of the English and American Law. My heartfelt thanks also go to Christa Buys for her sterling effort with regard to the final editing of the manuscript.

The task of completing a thesis puts a strain not merely on the author but also on his family, friends and colleagues. My thanks are due to all who

endured the process with such patience, fortitude and support, especially Luana, Joy and my children Jannah and Pat.

I dedicate this work to the memory of Vic and Ferdinand.

January 2002

Patrick van den Heever

SUMMARY

The application of the doctrine of *res ipsa loquitur* to medical negligence cases: a comparative survey by Patrick van den Heever, submitted in partial fulfillment for the requirements for the degree of DOCTOR LEGUM in the DEPARTMENT OF PUBLIC LAW, FACULTY OF LAW, UNIVERSITY OF PRETORIA, under the supervision of Prof P A CARSTENS.

The purpose and object of this thesis was to investigate and research the utility and effect of the application of the doctrine of *res ipsa loquitur* to medical negligence cases. More particularly, it was endeavoured to establish conclusively that the approach of the South African courts that the doctrine can never find application to medical negligence cases is untenable and out of touch with modern approaches adopted by other Common law countries. It was further endeavoured to provide a theoretical and practical legal framework within which the application of the doctrine to medical negligence cases and related matters can develop in South Africa, in future.

The research includes a comprehensive comparative survey of the diverging approaches with regard to the application of the doctrine to medical negligence cases between the legal systems of South Africa,

England and the United States of America. The most important conclusions which the investigation revealed were the following:

1. There are substantial differences with regard to the application of the doctrine between the three legal systems, with regard to the requirements for, the nature of, the procedural effect on the *onus* of proof and the nature of the defendant's explanation in rebuttal. These differences are further compounded by differences between the principles enunciated by the courts and the opinions of legal commentators on the subject.

2. Whereas the approach adopted by the South African courts with regard to the application of the doctrine to medical negligence cases is outdated and untenable, more legal clarity, however, exists in South Africa with regard to the application of the doctrine to personal injury cases in general, so that the existing principles which are applied provide a structure within which the extension of its application to medical accidents can be readily accommodated.

3. The current approach adopted by England, where provision is made for the application of the doctrine to obvious medical blunders as well as more complex matters, where the plaintiff is permitted to buttress evidence

relating to the *res* with expert medical evidence, commends itself for acceptance. Such an approach not only alleviates the plaintiff's burden of proof but also provides adequate protection to the defendant by endorsing the principle of honest doubt in the form of letting the defendant prevail if he comes to court and explains that despite due care, untoward results do sometimes occur especially in the practice of medicine.

4. The approach adopted by the majority of jurisdictions in the United States of America is probably too liberal and unstructured so that it may in some instances result in the imposition of liability in medical context, in a arbitrary fashion.

5. Constitutional principles such as procedural equality, policy and other considerations support the extension of the application of the doctrine to medical negligence cases in South Africa. There are also substantial grounds for advancing a persuasive argument that the majority judgment in the **Van Wyk v Lewis case** should be overruled and that the general application of the doctrine of *res ipsa loquitur* should not only be extended to cases of medical negligence, but also to related legal procedures which follow a medical accident such as medical inquests, criminal prosecutions and disciplinary inquiries instituted by the Health Professions Council of South Africa.

OPSOMMING

Die toepassing van die leerstuk van *res ipsa loquitur* in gevalle van mediese nalatigheid: 'n regsvergelykende studie

deur Patrick van den Heever, voorgelê ter vervulling van 'n deel van die vereistes vir die graad DOCTOR LEGUM, in die DEPARTEMENT PUBLIEKREG, FAKULTEIT REGSGELEERDHEID, UNIVERSITEIT VAN PRETORIA, onder promotorskap van Prof P A CARSTENS.

Die oogmerk en doel van hierdie proefskrif is om die aanwending en die effek van die toepassing van die leerstuk van *Res Ipsa Loquitur* op sake van mediese nalatigheid te ondersoek. In die besonder is gepoog om oortuigend aan te toon dat die huidige benadering van die Suid-Afrikaanse howe, naamlik dat die leerstuk nie op sake van mediese nalatigheid toepassing kan vind nie, mank gaan aan akademiese en praktiese stamina, en nie tred hou met moderne benaderings wat gevolg word in ander gemenereg lande nie. Daar word voorts gepoog om 'n teoretiese en praktiese raamwerk daar te stel, waarin die toepassing van die leerstuk op mediese- en ander verwante sake van mediese wanpraktyk, kan ontwikkel in die toekoms.

Die navorsing behels 'n omvattende regsvergelykende oorsig met betrekking tot die verskillende benaderings wat gevolg word in die regstelsels van Suid-Afrika, Engeland en die Verenigde State van Amerika met betrekking tot die toepassing van die leerstuk op sake van mediese nalatigheid. Die belangrikste gevolgtrekkings wat die ondersoek blootgestel het was die volgende:

1. Daar is aansienlike verskille met betrekking tot die toepassing van die leerstuk tussen die drie regstelsels ten aansien van die voorvereistes, aard, prosesregtelike effek op die bewyslas en die aard van die verweerder se verontskuldigende verduideliking in antwoord daarop. Hierdie verskille word verder beklemtoon deur verskille tussen die beginsels wat deur die howe nagevolg word in teenstelling met opinies van regsgeleerdes op die onderwerp.

2. Alhoewel die benadering van die Suid-Afrikaanse howe ten opsigte van die toepassing van die leerstuk op sake van mediese nalatigheid waarskynlik te konserwatief is, heers daar egter meer regsekerheid ten opsigte van die algemene toepassing daarvan op deliktuele sake as in die ander twee regstelsels met die gevolg dat die bestaande beginsels 'n struktuur daarstel, wat die uitbreiding van die

toepassingsgebied van die leerstuk tot sake van mediese nalatigheid, gemaklik kan huisves.

3. Die huidige benadering wat deur Engeland gevolg word naamlik dat die leerstuk toegepas word op ooglopende mediese ongelukke sowel as meer ingewikkelde sake, waar die eiser toegelaat word om die *res* met deskundige mediese getuïenis aan te vul, is besonder ontvanklik vir aanneming. Nie alleen vergemaklik hierdie benadering die eiser se bewyslas nie maar bied ook terselfdertyd genoegsame beskerming aan 'n verweerder wat homself van sy weerleggingslas kwytskiet as hy tot bevrediging van die hof kan aantoon dat ten spyte van die uitoefening van alle redelike sorg, komplikasies nogtans kan intree in mediese konteks.

4. Die benadering van die meerderheid jurisdiksies in die VSA is waarskynlik te liberaal en gaan in sommige opsigte mank aan struktuur, met die gevolg dat dit kan lei daartoe dat regs aanspreeklikheid op 'n arbitrêre wyse kan volg.

5. Konstitusionele beginsels soos prosesregtelike gelykheid, beleids- en ander oorwegings ondersteun die uitbreiding van die leerstuk tot mediese nalatigheid sake in Suid-Afrika. Daar bestaan ook geldige redes vir 'n oortuigende betoog dat die meerderheidsbeslissing in die **Van Wyk v Lewis-**

saak omvergewerp behoort te word en dat die toepassing van die leerstuk nie alleen uitgebrei behoort te word tot sake van mediese nalatigheid nie maar ook tot verwante mediese wanpraktyk aangeleenthede soos mediese-geregtelike doodsondersoeke, strafregtelike vervolgings en tugondersoeke van die Raad vir Gesondheidsberoepes van Suid-Afrika.

CHAPTER 1

1.1 GENERAL INTRODUCTION

One of the most important features of a medical negligence action as with any other legal action, is the obligation on the parties of establishing and proving the facts which support their respective cases. The principle that the plaintiff bears the burden of proof in medical negligence cases is applied universally ¹. The plaintiff in a medical negligence action is faced with particular evidential difficulties which include an investigation of ascertaining exactly what was done in the course of the medical intervention, securing expert medical evidence which will allege and substantiate sub-standard medical care, proving a causative link between the treatment and

¹ See for example: **Van Wyk v Lewis 1924 AD 438**; **Holmes v Board of Hospital Trustees of the City of London (1977) 8 DLR (3d) 67**; **Anderson v Moore 275 NW2d 842 849 (Neb 1979)**; **Hotson v East Berkshire AHA [1987] 2 All ER 909 (HL)**; Giesen *International Medical Malpractice Law* (1988) 513; Claassen and Verschoor *Medical Negligence in South Africa* (1992) 26; Jones *Medical Negligence* (1994) 95; Harney *Medical Malpractice* (1994) 419.

the injury and sometimes overcoming the traditional notion which is still nurtured in some courts that “the doctor can do no wrong”². With regard to this particular kind of litigation Jones says that:

“The process of identifying individual fault through the tort of negligence tends to overlook the wider issues involved in dealing with medical accidents. While on the one hand it may be acknowledged that some accidents are inevitable, and indeed that some accidents through carelessness will always occur, on the other hand the tort-action is not well-suited to identifying those accidents attributable to “organizational errors,” or methods of delivering health care which equate costcutting with efficiency, and result in overworked staff, inadequate safety measures, and an emphasis on the quantity at the expense of the quality of health care provision. An action for medical negligence must focus on the particular accident. One of the strengths of the forensic process is the ability to dissect events in fine detail, although that cannot always achieve that elusive goal “the truth”. But by focussing on the particular, tort cannot hope to address the broader question of how accidents might be prevented, apart from the notion that the threat of an action for negligence has some value in deterring careless conduct”³.

To prove the facts upon which the plaintiff’s cause of action is based he or she can produce direct- or circumstantial evidence, or a combination of such evidence. In the case of direct evidence the plaintiff is able to produce evidence of specific acts of negligence. In the case of circumstantial

² Lewis *Medical Negligence: A Practical Guide* (1992) 262. In this regard he says: “But there are other reasons why it is hard to prove medical negligence. One reason is, or at any rate has been, the anti-patient prejudice of the courts...one would think that the plaintiff was virtually guilty of *lèse majesté* in bringing the action”.

³ Jones 1-2. evidence a fact or facts are inferred from the facts the plaintiff tenders as evidence ⁴.

Some accidents occur under circumstances where evidence of the alleged negligence of the defendant is not easily available to the plaintiff but is or should be, to the defendant. The doctrine of *res ipsa loquitur* is generally considered to be no more than a convenient label to describe situations where, notwithstanding the plaintiff's inability to establish the exact cause of the accident, the fact of the accident by itself is sufficient to justify the conclusion that the defendant was probably negligent and in the absence of an explanation by the defendant to the contrary, that such negligence caused the injury to the plaintiff. In this regard various commentators have endeavoured to define and expound the doctrine. Strauss for example describes it as follows:

“As is well known, the doctrine rests on the fundamental principle that mere proof by a plaintiff of an injurious result caused by an instrumentality which was in the exclusive control of the defendant, or following upon the happening of an occurrence solely under the defendant's control, gives rise to a presumption of negligence on the part of the latter. The damage or injury must be of such a nature that it would ordinarily not occur except for negligence. Then *res ipsa loquitur*: ‘the thing speaks for itself’. This does not necessarily mean that the burden of proof has shifted to the defendant. But should the

⁴ Hoffmann and Zeffertt *The South African Law of Evidence* (1988) 588ff.

defendant fail to give an acceptable (ie reasonable) explanation for the events, the court might readily come to the conclusion that the defendant was negligent”⁵.

Giesen opines that it is:

“...a type of circumstantial evidence, based on logical reasoning, whereby certain facts may be inferred from the existence of or ordinary occurrence of other facts. Since it is a matter of ordinary observation and experience that an event sometimes tells its own story, the maxim is based on common sense and its purpose is to enable justice to be done, when the facts bearing on causation and the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant”⁶.

Claassen and Verschoor also explain the effect of the application of the doctrine as follows:

“The maxim is based on the fundamental principle that mere evidence of the detrimental occurrence and the fact that it was caused by an object under the exclusive control of the defendant, constitutes a *prima facie* factual presumption that the defendant had been negligent. The very occurrence of the detrimental incident “speaks for itself” because it is more consistent with negligence on the defendant’s part than with any other cause. The damage or *injuria* must be of such kind that it would normally not have taken place in the absence of negligence. This does not necessarily imply that the onus has shifted from the plaintiff to the defendant; but if the defendant does not succeed to give an acceptable explanation for the incident, the court may find that he was negligent”⁷.

In a similar vein Jones describes the utility of the doctrine as follows:

⁵ Strauss “*The Physician’s Liability for Malpractice: A Fair Solution to the Problem of Proof?*” 1967 SALJ 419.

⁶ Giesen 515.

⁷ Claassen and Verschoor 27.

“The maxim applies where an accident occurs in circumstances in which accidents do not normally happen unless there has been negligence by someone. The fact of the accident itself may give rise to an inference of negligence by the defendant which, in the absence of evidence in rebuttal, would be sufficient to impose liability. There is no magic in the phrase *res ipsa loquitur* - “the thing speaks for itself”. It is simply a submission that the facts establish a prima facie case against a defendant. The value of this principle is that it enables a plaintiff who has no knowledge, or insufficient knowledge, about how the accident occurred to rely on the accident itself and the surrounding circumstances as evidence of negligence, and prevents a defendant who does know what happened from avoiding responsibility simply by choosing not to give any evidence”⁸.

Hirsh *et al* provide the following exposition of the doctrine:

“The underlying premise of *res ipsa* is the result bespeaks negligence- it would not happen were the defendant not negligent. It is a presumption against the defendant and in some jurisdictions shifts the burden of proof to the defendant to show lack of negligence. In others it merely shifts the burden of going forward. The rationale behind the presumption is basically twofold: convenience and fairness. By virtue of his control over the instrumentality it is assumed the defendant knows what happened. At least he is more likely to know than the plaintiff. Also, in terms of fairness the defendant is in a better position of explaining what happened. Plaintiff has been injured by something over which he had no control and certainly had no idea it would be thrust upon him”⁹.

⁸ Jones 97.

⁹ Hirsh *et al* “*Res Ipsa Loquitur and Medical Malpractice - Does it really Speak for the Patient?*” 1984 *Med Trial Tech Q* 410 412; In **Horner v Pacific Ben Ass’n Hospitals** 462 Wash 2d 351 382 P2d 518 523 (1963) Hales J expressed the following thoughts on the doctrine: “The rule is a good one, and it ought not to be muddled with over-refinement and the casuistry

so frequently the by-product of overwriting and overtalking about the same subject. We declared the rule in near original form, supported by a plethora of authority, in the following language: “This doctrine constitutes a rule of evidence peculiar to the law of negligence and is an exception to or perhaps more accurately a qualification of, the general rule that negligence is not to be presumed, but must be affirmatively proved. By virtue of the doctrine, the law recognises that an accident, or injurious occurrence is of itself sufficient to establish *prima facie* the fact of negligence on the part of the defendant, without further or direct proof thereof, thus casting upon the defendant the duty to come forward with an exculpatory explanation, rebutting or otherwise overcoming the presumption or inference of negligence on his part”. For examples of earlier landmark cases where the doctrine was considered in cases of medical negligence, see for example: **Mitchell v Dixon 1914 AD 519**; **Van Wyk v Lewis supra 438**; **Morris v Winsbury-White [1937] 4 All ER 494 (KB)**; **Mahon v Osborne [1939] 2 KB 14 [1939] 1 All ER 535 (CA)**; **Cassidy v Ministry of Health [1951] 2 KB 343 [1951] 1 All ER 574 (CA)**; **Roe v Ministry of Health [1954] 2 (QB) 66**; **Foster v Thornton 170 So 459 (Fla 1936)**; **Dierman v Providence Hospital 31 Cal2d 290 188 P2d 12 (1947)**; **Ybarra v Spanguard 25 Cal2d 486 154 P2d 687 (1944)**; **Salgo v Leland Stanford Jr Univ Bd of Trustees 154 2d 560 317 P2d 170 (Cal App 1957)**. For examples of more recent cases see: **Pringle v Administrator Transvaal 1990 2 SA 379 (W)**; **Howard v Wessex Regional Health Authority [1994] 5 Med LR 57 (QB)**; **Delaney v Southmead Health Authority [1995] 6 Med LR 355 (CA)**; **Ratcliffe v Plymouth & Torbay Health Authority [1998] LLR 162 (CA)**; **Cangelosi v Our Lady of the Lake Regional Medical Center 564 So2d 654 (1990) La LEXIS 1009 (1990)**; **Welte v Mercy Hospital 482 NW2d 437 (1992) Iowa Sup LEXIS 47 (1992)**; **Wick v Henderson, Mercy Hospital and Medical Anesthesia Associates 485 NW2d 645 (1992) Iowa Sup LEXIS 114 (1992)**.

1.2 PURPOSE

The purpose of the present thesis is to research the utility and effect of the application of the doctrine of *res ipsa loquitur* to medical negligence cases. More particularly, the aim and object of this thesis is to establish conclusively that the approach of the South African courts that the doctrine of *res ipsa loquitur* can never find application to medical negligence cases is untenable and out of touch with modern approaches adopted by other Common law countries. It is further endeavoured to provide a theoretical and practical legal framework within which the application of the doctrine of *res ipsa loquitur* to medical negligence and related matters can develop in future.

The method employed is to set off and compare the approach adopted in the legal system of South Africa with those applied in the legal systems of England and the United States of America.

1.3 CHOICE OF LEGAL SYSTEM

In selecting the legal systems of England and the United States of America for the comparative survey the following issues were considered:

1. The English legal system appears in general to be representative of the Anglo-Saxon approach also adopted in Australia and until very recently in Canada ¹⁰. In England the application of the doctrine to medical negligence cases is limited but regarded by some commentators as an important evidential tool in the armament of a ‘patient - plaintiff’.

2. In the United States of America the doctrine is applied much more liberally and there is also divergent approaches between the various states. In contrast to the South African and English systems the general requirements for the application have also been modified to a certain extent but such modification must be considered as the natural growth of the doctrine and more particularly as a more natural employment of the doctrine through adaptation to a particular field of litigation ¹¹.

3. The German legal system was also considered as representative of the Continental approach as a possible system to compare with regard to the

¹⁰ In **Fontain v Loewen Estate (1997) 156 DLR (4TH) 181** the Supreme Court of Canada held that the doctrine of *res ipsa loquitur* must be treated as expired and no longer used as a separate component in negligence actions. See also McInnes “*The Death of Res Ipsa Loquitur in Canada*” (1998) *LQR* 547-550.

¹¹ See 190 *infra*.

application of the doctrine but it would seem that the only comparable evidentiary rule is that of the “*prima facie* evidence of first appearance” (or so-called “Schussigkeit” in medical malpractice context) which had the effect of making the legal system of the USA a more attractive and appropriate choice for purposes of the comparative survey”¹².

1.4 METHODS

The method employed to deal with the application of the doctrine of *res ipsa loquitur* to medical negligence cases is to firstly, expound and discuss the legal position relating to the application of the doctrine in general and to medical negligence cases in particular, in each of the three legal systems separately, with the incorporation of case law and legal opinion and secondly, to embark on a comparative- and critical analyses by having regard to the similarities and differences of the various diverging approaches in the three legal systems. There are substantial differences between the three legal systems with regard to the requirements for, the nature of, the

¹² De Lousanoff *Facilitations of Proof in Medical Malpractice Cases: A Comparative Analysis of American and German Law* (1982) 128ff; For a further discussion of the burden of proof in medical negligence cases in German Law see: Buppert *Arzt und Patient als Rechtsuchende* (1980) 123; Deuch *Arztrecht und Arzneimittelrecht* (1992) 145; Giesen *Arzthaftungsrecht* (1992) 192, Laufs und Uhlenbruch *Handbuch des Arztrecht* (1992) 666.

procedural effect on the onus of proof and the nature of the defendant's explanation in rebuttal. These differences are further compounded by differences between the principles enunciated by the courts and the views of legal commentators on the subject. Although the aforesaid differences militate against the presentation of an accurate description of the approach followed in each legal system, it is endeavoured to find and expose as much common ground as possible in each respective legal system with reference also to case law and legal opinion. The United States of America provide an even more formidable challenge in this regard due to the diverging approaches followed by the various states and the plethora of reported cases and legal commentaries on the subject. In order to keep the parameters of this thesis within manageable bounds it is endeavoured to present a broader perspective where more emphasis is placed on majority approaches and concurring legal opinion.

In the chapters relating to the legal systems of South Africa, England and the United States of America which follow, 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 exposition of the application of the doctrine to medical negligence cases

follows thereafter, with reference to case law and legal opinion. Due to the fact that the South African courts have consistently declined to apply the doctrine to medical negligence cases it is problematic to compare the South African case law with the case law of England and the USA on the subject. In contrast to the position in South Africa there is a panoply of reported authorities on the subject in England and a plethora of authorities in the USA. To also keep the comparative survey of the latter legal systems within manageable bounds the case law has been divided into broader medical categories. Most judgments selected in the text are leading ones as far as the application of the doctrine is concerned which are supplemented in some instances by reference to other important judgments in the footnotes. The opinions of legal commentators in the USA on the subject is comprehensive to the extent that an overview of such commentaries is also provided in the text.

In the chapter relating to the legal system of South Africa it will be shown that the judgment in **Van Wyk v Lewis** presently bars the application of the doctrine to medical negligence cases. In order to achieve the main objective referred to above, it is necessary to subject the **Van Wyk** judgment to close scrutiny and critical evaluation, in order to show conclusively that this

judgment should be overruled. Each chapter is concluded with a synopsis of the relevant legal principles which are applied when the doctrine is invoked generally, and with the exception of the South African legal system, to medical negligence cases in particular. A comparative and critical analyses between the three legal systems follow thereafter which include a synopsis at the end. In conclusion an attempt is made to highlight further considerations in support of the application of the doctrine to medical negligence cases in South Africa and certain *de lege ferenda* proposals are also ventured with regard to the application of the doctrine to other related legal procedures such as medical inquests, criminal prosecutions and disciplinary inquiries instituted by the Health Professions Council of South Africa.

CHAPTER 2

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

2.1 INTRODUCTION

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

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

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

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

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

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

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

2.2 THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN SOUTH AFRICA

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

³ 1874 Buch 962 118.

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

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

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

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

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

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

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

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

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

cases⁹.

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

2.3.1 INTRODUCTION

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

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

applied if the following requirements are adhered to:

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

2.3.2 NEGLIGENCE

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

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

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

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

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

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

¹² Cooper supra 100.

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

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

2.3.3 CONTROL OF THE INSTRUMENTALITY

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

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

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

to control exists¹⁶.

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

2.4.1 INTRODUCTION

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

2.4.2 *RES IPSA LOQUITUR* AND CIRCUMSTANTIAL EVIDENCE

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

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

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

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

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

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

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

¹⁸ Cooper 482.

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

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

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

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

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

²² **1997 3 SA 1039 (E) 1048**.

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

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

2.4.3 ONUS OF PROOF

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

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

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

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

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

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

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

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

²⁵ CCJ 1952 *SALJ* 245.

²⁶ **supra** 445.

case there has been no shifting of the onus²⁷.

2.4.4 THE NATURE OF THE DEFENDANT'S EXPLANATION IN REBUTTAL

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

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

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

²⁸ **supra 392.**

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

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

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

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

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

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

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

³² 1964 1 SA 609 (D) & (CLD).

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

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

³³ **supra 780.**

³⁴ **supra 622 626 G-H.**

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

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

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

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

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

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

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

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

³⁷ Cooper 122ff.

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

2.5 MEDICAL NEGLIGENCE CASES

2.5.1 INTRODUCTION

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

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

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

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

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

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

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

⁴¹ **supra 438.**

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

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

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

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

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

⁴⁴ Strauss 1967 *SALJ* 423.

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

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

2.5.2 CASE LAW

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

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

⁴⁶ Strauss 1967 SALJ 422.

⁴⁷ **supra** 525.

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

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

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

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

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

⁴⁹ **supra** 267.

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

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

⁵⁰ **supra 309.**

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

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

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

⁵¹ 1923 E 37.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁵⁴ 1923 supra 46.

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

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

⁵⁵ 1923 *supra* 47.

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

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

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

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

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

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

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

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

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

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

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

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

evenly balanced he cannot claim a verdict ⁶⁰.

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

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

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

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

⁶¹ Van Wyk v Lewis supra 464.

In this regard he said:

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

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

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

⁶³ **supra 221**.

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

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

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

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

⁶⁴ Strauss and Strydom 280.

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

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

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

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

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

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

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

2.5.3 LEGAL OPINION

2.5.3.1 INTRODUCTION

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

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

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

2.5.3.2 THE MAJORITY JUDGMENT IN *VAN WYK v LEWIS*

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

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

⁶⁸ Strauss and Strydom 279. See fn 43 supra.

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

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

⁶⁹ Strauss 1967 *SALJ* 424.

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

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

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

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

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

⁷² Gordon, Price and Turner 116.

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

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

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

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

⁷⁴ Claassen and Vershoor 28.

⁷⁵ Carstens 1999 *De Jure* 19.

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

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

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

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

2.5.3.3 CRITICAL ANALYSIS OF THE MAJORITY JUDGMENT

2.5.3.4 INTRODUCTION

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

2.5.3.5 THE EVIDENCE OF DR LEWIS

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

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

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

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

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

78 .

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

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

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

2.5.3.6 CONCLUSION

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

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

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

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

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

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

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

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

⁸² **Stacey v Kent** *supra* 344.

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

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

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

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

⁸⁴ Carstens 1999 *De Jure* 26.

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

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

2.6 SYNOPSIS

2.6.1 INTRODUCTION

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

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

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

2.6.1.1 THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE

2.6.1.2 NEGLIGENCE

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

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

⁸⁷ Cooper 100.

⁸⁸ **Groenewald v Conradie supra 187.**

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

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

2.6.1.3 CONTROL

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

2.7 THE NATURE OF THE DOCTRINE

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

2.8 ONUS OF PROOF

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

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

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

plaintiff⁹³.

2.9 THE NATURE OF DEFENDANT'S EXPLANATION IN REBUTTAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.10 CONCLUSION

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

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

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

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

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

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

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.

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

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 to tender evidence as to why or how the barrel fell or to verify that the defendant controlled the barrel. The defendant, 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 defendant 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

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 defendant 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 negligence⁷.

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 incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts”.

In more recent times there were two authoritative 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 usage⁹.

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

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.

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

¹² [1988] RTR 298 (PC).

facts is incapable of reduction to a formula¹³. The doctrine is however well settled in English authority and applied to a wide variety of circumstances¹⁴.

3.3 REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE IN ENGLISH LAW

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); **Chaproniere 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 underwear 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 yoghurt); **Stafford v Conti Commodity Services Ltd [1981] 1 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 loquitur* 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

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

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 **Chaproniere 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; Lloyd v West Midlands Gas Board supra 1242; Duval v Anka Builders (1992) 28 NSWLR; Pritchard v Clwyd CC [1993] PIQR 21.**

employer vicariously liable²⁴.

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 cause²⁵. 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 case²⁶.

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

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.

evidence²⁸. 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 defendant²⁹.

Initially English courts in the face of severe criticism³⁰, elevated *res ipsa loquitur* to a principle of substantive law³¹. 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

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 circumstances³².

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 maxim³³. 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

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

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 negligence³⁸.

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.

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.

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 eventuality⁴². The plaintiff is also not required to disprove unlikely or improbable explanations which seek to absolve the defendant⁴³. The defendant is, however, not required to prove that his explanation is more probable to be correct than any other explanation⁴⁴.

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,

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”.

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 Grubb⁴⁷ suggest that there are two reasons why the doctrine will usually not be available to a plaintiff in a medical negligence action.

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 .

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 adjunct 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

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

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.

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 period⁵⁷.

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. Its 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.

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.

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.

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 damage⁶⁵. 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,

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.

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 paralysis 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.

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

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 cholecystectomy 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

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 misfortune⁷⁵. 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 care⁷⁷. 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 arthrodesis 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

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 asymptomatic 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 Dupuytren's 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.

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 musculocutaneous 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. Russell 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.

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.

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.

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

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 defendant's failure to discover the dislocation during subsequent visits.

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

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.

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 defenders¹⁰⁷.

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 liability¹⁰⁹.

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 exceptional¹¹⁰. 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

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,

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* test¹¹² is applied to this same set 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

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 Governors 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.

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.

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

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 defendant¹¹⁹. 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.

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.

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 LJ 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.

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

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.

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 arithmetical 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

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;

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 negligence¹²⁹.

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.

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.

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

¹³⁴ **Chaproniere 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.

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 succeed¹³⁹.

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 negligence¹⁴⁰.

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.

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 eventuality¹⁴³.
4. The plaintiff is not required to disprove unlikely or improbable explanations which seek to absolve the defendant¹⁴⁴.
5. The defendant is not required to prove that his explanation is more probable to be correct than any other explanation¹⁴⁵.

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 prevents a 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.

CHAPTER 4

THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE CASES IN THE UNITED STATES OF AMERICA

4.1 INTRODUCTION

In some instances the facts and circumstances accompanying an injury may be of such a nature as to permit an inference of negligence on the part of the defendant.

By applying the doctrine of *res ipsa loquitur* the jury is permitted to draw an inference of negligence from the occurrence itself if the instrumentality which caused the injury was under the management and control of the defendant at the time, and the occurrence was such as in the ordinary course of things would not happen unless those who had its management and control, exercised proper care. If the plaintiff under such circumstances did not himself contribute to the injury and in the absence of an acceptable explanation by the defendant, the accident itself affords sufficient evidence that the injury was probably caused by want of proper care. In medical

context the real question is generally whether or not during the course of the medical intervention, an extraordinary incident or unusual event occurred which could be regarded as falling outside the scope of the routine professional activity in the performance of such an intervention, which if left unexplained, would in itself reasonably indicate to the reasonable man it was the likely cause or causes of the injury ¹.

Generally speaking, the application of the doctrine of *res ipsa loquitur* is designed to alleviate the plaintiff's burden of proof by facilitating proof in circumstances where the plaintiff is unable to provide direct evidence of specific acts or omissions which may constitute negligence but where the accident itself according to common experience, bespeaks negligence. With

¹ The court in **Sanders v Smith 200 Miss 551 27 So2d 889 (1946)** said the following in this regard: "...we think, that the test, generally, is not that the result of the operation was unusual and unexpected, or even fatal, alone and by itself, because, without an abnormal and rare end to operation, there would not exist an occasion for an action in damages from it. The real question, generally, is whether or not in the process of the operation any extraordinary incident or unusual event, outside of the routine of the action of its performance, occurred, and beyond the regular scope of its customary professional activity in such operations, which, if unexplained, would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence. If there were such extraneous interventions, then the doctrine of *res ipsa loquitur* would be applicable to call upon the defendant to explain the matter, by evidence of exculpation, if he could. The jury would then decide the issue of fact in the case".

reference to medical malpractice cases Harney expresses the following opinion:

“In malpractice cases, the doctrine has experienced a highly controversial development. The medical profession has proposed legislation calling for the elimination of *res ipsa loquitur* entirely in actions against physicians. Legal scholars argue that, rather than facilitating a more precise judgment, the application of *res ipsa loquitur* in malpractice actions has resulted in legal uncertainties”².

In this chapter the origin and development of the doctrine is also traced and the general requirements for the application of the doctrine, the nature and effect of the application of the doctrine on the *onus* of proof and the nature of the defendant’s explanation in rebuttal are expounded. A detailed discussion of the application of the doctrine to medical negligence cases in particular follows, with reference to case law and legal opinion. An overview of such commentaries is also provided. This chapter is concluded with a synopsis of the relevant legal principles which are applied when the doctrine is invoked generally and to medical negligence cases in particular.

² Harney 429.

4.2 THE ORIGIN AND DEVELOPMENT OF THE DOCTRINE IN THE UNITED STATES OF AMERICA

Although the doctrine seems to have been used as early as 1614 where a usuary was apparent on the face of an instrument it would appear that its *fons et origo* in the USA is also the case of **Byrne v Boadle** ³.

As in England it also seems as if the exposition of the doctrine by Erle CJ in **Scott v London and St Katherine's Dock Co** is widely regarded as the first statement of the principle ⁴. In its inception the doctrine was regarded as nothing more than a reasonable conclusion derived from the circumstances of an unusual accident, that it was probably the defendant's fault.

Prosser and Keeton say that the aftermath of the decision in **Christie v Griggs** to the effect that in cases of injuries to passengers at the hands of carriers, the carrier had the burden of proving that it had not been negligent, became confused and intermingled with the doctrine of *res ipsa loquitur*

³ Prosser "The Procedural Effect of *Res Ipsa Loquitur*" 1936 *Minn L Rev* 241; Prosser and Keeton on *The Law of Torts* (1984) 243.

⁴ **supra** 601.

and from this fusion there developed an uncertain doctrine which has through the years been the source of considerable trouble to the courts ⁵. Despite severe criticism ⁶ the doctrine is applied in most of the states in the USA to a wide variety of situations and its range is as broad as the possible events which justify its invocation ⁷.

⁵ **Christie v Griggs supra 79**; Prosser and Keeton 243.

⁶ See for example Bond CJ in **Potomac Edison Co v Johnson 160 Md 33 152 A 633 (1930)**: “It adds nothing to the law, has no meaning which is not more clearly expressed for us in English, and brings confusion to our legal discussions. It does not represent a doctrine, is not a legal maxim, and is not a rule”.

⁷ See for example: **Edgerton v New York & Hartford Railroad Co 39 NY 227 (1868)** (derailment); **Griffen v Manice 166 NY 188 59 NE 925 (1901)** (falling elevator); **Pillars v RJ Reynolds Tobacco Co 117 Miss 490 500 78 So 365 366 (1918)** (human toe in plug of chewing tobacco); **Shoshone Coca-Cola Bottling Co v Dolinski 82 Nev 439 420 P2d 855 (1966)** (mouse in squirt); **Gilbert v Korvette Inc 457 Pa 602 327 A2d 94 (1974)** (child’s foot caught in escalator); **Horowitz v Kevah Konner Inc 67 AD2d 38 414 NYS2d 540 (1979)** (chartered bus left snowy throughway and turned over); **Carter v Liberty Equipment Co Inc 611 SW2d 311 (Mo App 1980)** (air compressor crashed through store window and hit employee); **Payless Discount Centers Inc v 25-29 North Broadway Corp 83 AD2d 960 433 NYS2d 21 (1981)** (sprinkler system in ceiling collapsed); **McWhorter v City of New Smyrna Beach Utilities Commission 400 So2d 23 (Fla App 1981)** (sewer blockage in city’s sewer line); **Emerick v Raleigh Hills Hospital - Newport Beach 133 3d 575 184 Cal Rptr 92 (Cal App 1982)** (bathroom sink in hospital); **Watzig v Tobin 292 Or 645 642 P2d 651 (1982)** (motorist struck cow on highway); **Cangelosi v Our Lady of the Lake Regional Medical Center supra 654** (fracture of two cartilage rings in trachea during gall-bladder surgery).

4.3 REQUIREMENTS FOR THE INVOCATION OF THE DOCTRINE

4.3.1 INTRODUCTION

In the USA the following basic requirements must be met to enable a plaintiff to rely on the doctrine successfully:

- a. The accident must be of a kind which ordinarily does not occur in the absence of someone's negligence;**
- b. the accident must be caused by an agency or instrumentality within the exclusive control of the defendant;**
- c. the accident must not have been due to any voluntary action or contribution on the part of the plaintiff ⁸.**

In some jurisdictions a controversial fourth condition to the effect that the **evidence as to the true explanation of the event must be more accessible**

⁸ Prosser 1936 *Minn L Rev* 241 242; Prosser and Keeton 244 suggest that these requirements were originally derived from the first edition of Wigmore on Evidence, § 2509 published in 1905. See also: Ficarra *Surgical and Allied Malpractice* (1968) 148; Morris and Moritz *Doctor and Patient and The Law* (1971) 403; De Lousanoff 21; Kramer and Kramer *Medical Malpractice* (1983) 88; Moore and Kramer *Medical Malpractice: Discovery and Trial* (1990) 213; Harney 430; Boumil and Elias *The Law of Medical Liability in a Nutshell* (1995) 55-56; Healy 195.

to the defendant than to the plaintiff , is required ⁹.

4.3.2 NEGLIGENCE

The occurrence must be of a kind which ordinarily does not occur in the absence of someone's negligence ¹⁰. The applicability of the doctrine therefore depends on whether in the light of ordinary (common) experience the accident was the result of the defendant's negligence ¹¹. The evidence required in order for the doctrine to be invoked must be such that reasonable persons can say that it is more likely that there was negligence associated with the cause of the accident than that there was not ¹².

4.3.3 CONTROL

The accident must be caused by an agency or instrumentality within the

⁹ See for example: **Buckelew v Grossbard 87 NJ 512 435 A2d 1150 1157 (1981)**; **Strick v Stutsman 633 SW2d 148 (Mo App 1982)**; Prosser and Keeton 254.

¹⁰ Prosser and Keeton 244; Giesen 516; Harney 430. See for example: **Seneris v Haas 45 Cal2d 811 291 P2d 915 (1955)**; **Frost v Des Moines Still College of Osteopathy and Surgery 248 Iowa 294 79 NW2d 306 (1956)**; **Fehrman v Smirl 20 Wis2d 1 121 NW2d 255 (1963)**.

¹¹ Prosser and Keeton 247.

¹² **Marathon Oil Co v Sterner Tex 632 SW2d 571 (1982)**; **Markarian v Pagano 87 AD2d 729 499 NYS2d 335 (1982)**; **Smith v Little 626 SW2d 906 907 (Tex Ct of App 1981)**; Prosser and Keeton 248.

control of the defendant. Traditionally, the plaintiff had to prove that the defendant was in exclusive control of the instrumentality which caused the injury¹³.

In **Watzig v Tobin**¹⁴ the court stated that if exclusive control or custody is not required and if the plaintiff's voluntary participation does not prohibit its application, *res ipsa loquitur* would seem to require nothing more than evidence from which it could be established that the event was of a kind which does not normally occur in the absence of negligence and that the negligence which caused the event was probably that of the defendant.

This approach has been accepted by a number of courts and Prosser and

¹³ See for example **Bjornson v Saccone 6.11 88 (1st Dist Ill App 1899)**; This requirement is phrased differently in the Restatement of Torts (second) as follows: "the indicated negligence is within the scope of the defendant's duty to the plaintiff" and comment (g) to this section also states: "Exclusive control is merely one fact which establishes the responsibility of the defendant and if it can be established otherwise, exclusive control is not essential to a *res ipsa loquitur* case" (§ 328 D (1965)).

¹⁴ **supra 655**. See also: **Payless Discount Centers Inc v 25-29 North Broadway Corp, supra 22**; **Parrillo v Giroux Co Inc_RI_426 A2d 1313 (1981)**; Prosser and Keeton 251; Giesen 516; Harney 430.

Keeton suggest that it would be far better if the control test were discarded altogether so that the requirement is that the negligent act complained of should be of such a nature that the defendant would more likely than not, be responsible for it ¹⁵.

In the case of multiple defendants and unless there is vicarious liability or shared control the plaintiff does not succeed in making out a preponderant case against either of two defendants by merely showing that the plaintiff has been injured by the negligence of one or the other ¹⁶. In both carrier and medical negligence cases the element of exclusivity has however been eroded to a great extent. Apart from these exceptions and certain other infrequent exceptions, *res ipsa loquitur* is still not applied against multiple defendants where it is inferable that only one has been negligent ¹⁷.

¹⁵ Prosser and Keeton 251. See also for example: **Gilbert v Korvette Inc supra 94**.

¹⁶ **Turner v North American Van Lines 287 SW2d 384 (Mo App 1956); Beakly v Houston Oil & Minerals Corp 600 SW2d 396 (Tex Civ App 1980); Fireman's Fund American Insurance Companies v Knobbe 93 Nev 201 562 P2d 825 (1977);** Prosser and Keeton 251; McCoid *Negligence Actions Against Multiple Defendants* 1955 *Stan L Rev* 480.

¹⁷ See for example **Housel v Pacific Electric Railway Co 167 Cal 245 139 P 73 (1914); Ybarra v Spanguard supra 687; Anderson v Somberg 67 NJ 291 338 A2d 1 366 (1975); Dement v Olin-Mathiesen Chemical Corp 282 F2d 76 (5th Cir 1960); Becker v American Airlines Inc SDNY 200 F Supp 839 (1961);** Prosser and Keeton 253.

4.3.4 CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF

The third condition is that there must be an absence of any act on the part of the plaintiff contributing to the occurrence, its purpose being to insure that the plaintiff does not recover damages for injuries for which he himself is responsible¹⁸.

Since the advent of comparative negligence acts which serve to reduce the plaintiff's damages to the extent of his own negligence, this requirement has lost its logical basis unless the plaintiff's negligence appears to be the sole proximate cause of his injury¹⁹.

4.3.5 EVIDENCE MORE ACCESSIBLE TO THE DEFENDANT

Some courts require a controversial fourth condition to the effect that the

¹⁸ See for example: **Dugas v Coca-Cola Bottling Co 356 So2d 1054 (La App 1978)**; **Brantley v Stewart Building & Hardware Supplies Inc 274 Ark 555 626 SW2d 943 (1982)**; **Emerick v Raleigh Hills Hospital - Newport Beach supra 92**; **Watzig v Tobin supra 651**.

¹⁹ Some states have discarded this requirement because of comparative negligence acts for example Oregon, Colorado and Wisconsin; Prosser and Keeton 254; Boumil and Elias 59.

true explanation of the accident must be more accessible to the defendant²⁰. The underlying reason for this requirement may be to give the doctrine a greater procedural effect but it cannot be regarded as an indispensable requirement nor does it have any real importance in practice²¹.

4.4 THE PROCEDURAL EFFECT OF THE APPLICATION OF THE DOCTRINE ON THE *ONUS* OF PROOF

4.4.1 INTRODUCTION

²⁰ See for example: **Buckelew v Grossbard supra 1157; Strick v Stutsman supra 148; Holman v Reliance Insurance Companies 414 So2d 1298 (La App 1982); Faby v Air France NY City Small Misc2d 840 449 NYS2d 1018 (CI 1982).**

²¹ Prosser and Keeton 255. Prosser 1936 *Minn L Rev* 260 argues that there is no policy of law in favour of permitting a party who has the burden of proving in the first instance to obtain a directed verdict merely by showing that he knows less about the facts than his adversary. He also contends that this additional condition may have the result that sheer ignorance would become the most powerful weapon in the law. (Prosser “*Res Ipsa loquitur in California*” 1949 *Cal L Rev* 183 184; Jaffe “*Res Ipsa Loquitur Vindicated*” 1951 *Buff L Rev* 6-7 (contra) submits that although raw probabilities do not normally suffice to take a case to the jury it is fair to allow the case to go to the jury where the defendant is in a superior position to explain the accident. Ablin “*Res Ipsa Loquitur and Expert Opinion Evidence in Medical Malpractice Cases: Strange Bedfellows*” 1996 *Virginia L Rev* 325 331 opines that based on Prof Jaffe’s reasoning it follows that the defendant’s attempt to explain the occurrence should destroy a *res ipsa* inference, and the case should go to the jury only if there is enough circumstantial evidence to support a plaintiff’s verdict without the benefit of the doctrine.

In the USA as in England and South Africa, it appears that the doctrine is also considered to be a form of circumstantial evidence and thus forms part of the law of evidence. Under the circumstances it is necessary also to consider its nature and role in the law of evidence.

4.4.2 RES IPSA LOQUITUR AND CIRCUMSTANTIAL EVIDENCE

Unless there are special circumstances applicable or a special relationship between the plaintiff and the defendant, the majority of courts in America regard the doctrine as a form of circumstantial evidence²². The application of the doctrine permits an inference of negligence against the defendant. In

Sweeny v Erving this inference theory was formulated as follows:

“[Res] ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forstall the verdict. Res ipsa

²² See for example: **National Tea Co v Gaylord Discount Department Stores Inc** 100 3d 806 56 Ill Dec 265 427 NE2d 345 (Ill App 1981); **Watzig v Tobin supra** 651. Prosser and Keeton 257. See also in general: Cleary *et al McCormick On Evidence* (1987) 967; Fishman *Jones on Evidence Civil and Criminal* (1992) 62; Chadburn *Wigmore On Evidence* (1995) 489ff; Carlson *et al Evidence: Teaching Materials For an Age of Science and Statutes* (1997) 181.

loquitur, where it applies, does not convert the Defendant's general issue into a affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff”²³.

4.5 ONUS OF PROOF

Through the years the American courts have not been in harmony with regard to the procedural advantage that a plaintiff obtains against the defendant by invoking the doctrine against the defendant²⁴. There appears to be three divergent approaches which have been adopted by the courts:

4.5.1 THE PERMISSIBLE INFERENCE APPROACH

The least effect which the successful application of the doctrine may have on the burden of proof is to permit the jury to infer from the plaintiff's case without other evidence that the defendant was negligent. The effect of the inference is to satisfy the burden which rests on the plaintiff to introduce evidence upon which reasonable men may find in his favour. The plaintiff

²³ 228 US 233 33 416 57 1 Ed 815 (Sct 1913).

²⁴ Prosser and Keeton 257; De Lousanoff 57; Giesen 517.

will also on this basis escape a nonsuit or a dismissal, since there is enough evidence to go to the jury ²⁵.

The inference of negligence to be drawn from the circumstances is left to the jury who are permitted, but not compelled to find it. On this basis, and in most jurisdictions the burden is not shifted to the defendant nor an obligation to move forward with the evidence, except in the limited sense that if he fails to introduce evidence, he runs the risk that the jury may find against him ²⁶. In this regard it is important to note that many inferences may be possible but none of them may be so clear as to make the drawing of such an inference compulsory. On the inference approach and as a general proposition the strength of the inference to be drawn will be dependent on the specific circumstances of the case ²⁷.

4.5.2 THE PRESUMPTION APPROACH

A greater advantage is afforded to the plaintiff if a successful invocation of

²⁵ Prosser 1936 243; **Buckelew v Grossbard supra 1150; Wilson v United States 645 F2d 728 (9th Cir 1981); Thomkins v Northwestern Union Trust Co Mont 645 P2d 402 (1982); De Lousanoff 51; Kramer and Kramer 89; Prosser and Keeton 258; Boumil and Elias 56.**

²⁶ **Rathvon v Columbia Pacific Airlines 30 193 633 P2d 122 (Wn App 1981); Estate of Neal v Friendship Manor Nursing Home 113 759 318 NW2d 594 (Mich App 1982).**

²⁷ **Watzig v Tobin supra 651.**

the doctrine is treated as creating a presumption. The effect of this approach means that the jury is not only permitted to infer negligence against the defendant but in the absence of exculpatory evidence by the defendant the court will require the jury to do so.

If the defendant in these circumstances rests his case without evidence the plaintiff will be entitled to a directed verdict. The burden of going forward with the evidence is cast on the defendant but it does not imply that the defendant is required to tender evidence of greater weight than that offered by the plaintiff. If the scales are evenly balanced when all the evidence is in, the verdict must be for the defendant ²⁸.

4.5.3 THE SHIFTING OF THE BURDEN OF PROOF APPROACH

The greatest effect afforded to the application of the doctrine is to shift the *onus* of proof to the defendant. This means that the defendant is required

²⁸ **Newing v Cheatham 15 Cal3d 351 124 Cal Rptr 193 540 P2d 33 (1975); Hyder v Weilbaeher 54 287 283 SE2d 426 (Nc App 1981); Hammond v Scot Lad Foods Inc 436 NE2d 362 (Ind App 1982); De Lousanoff 54; Prosser and Keeton 258.**

to prove on the preponderance of the evidence that the injury was not caused by his negligence²⁹. As the defendant will in some instances be unable to tender an explanation the imposition of such a burden would amount to a form of strict liability and cannot be supported on a general basis³⁰. When the plaintiff is able to tender specific evidence of the defendant's negligence it is sometimes held that there is no room for inference or by attempting specific proof the plaintiff has waived the benefit of the doctrine. Although a plaintiff is bound by his own evidence, proof of some specific facts does not necessarily exclude inferences of others³¹. The principle appears to be that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but does in fact not provide a full and complete explanation of the occurrence, does not destroy the inferences which are consistent with the evidence, and consequently does not deprive the plaintiff of the benefit of *res ipsa loquitur*³².

²⁹ Prosser 1936 *Minn L Rev* 244; **Weiss v Axler 137 Colo 544 328 P2d 88 (1958)**; **Johnson v Coca-Cola Bottling Co 239 Miss 759 125 So2d 537 (1960)**; **Homes v Gamble 624 P2d 905 (Colo App 1980)**; **Toussant v Guice 414 So2d 850 (La App 1982)**; De Lousanoff 56.

³⁰ Prosser and Keeton 259

³¹ *Ibid* 260.

³² **Mobil Chemical Co v Bell Tex 517 SW2d 245 (1974)**; **Kranda v Houser-Norborg Medical Corp 419 NE2d 1024 (Ind App 1981)**; Prosser and Keeton 260.

4.6 THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL

The nature of the defendant's evidence in rebuttal is obviously dependent on whether the burden of proof is cast on the defendant or not. With the exception of a minority of jurisdictions it is generally agreed that the invocation of the doctrine does not cast the burden of proof on the defendant and on this basis the defendant is not obliged to tender any evidence and if he does, it need only permit the jury to say that it is as probable that he was not negligent than that he was ³³.

The inference of negligence drawn from the circumstances of the accident must be balanced against the defendant's evidence. The jury is not obliged to draw the inference and it only has weight while reasonable persons are able to derive it from facts in evidence ³⁴.

In order to get a directed verdict in his favour the defendant must tender

³³ **Vonault v O'Rourke 97 Mont 92 33 P2d 535 (1934); Micek v Weaver-Jackson Co 12 2d 19 54 P2d 768 (Cal App 1936); Nopson v Wockner 40 Wn2d 645 245 P2d 1022 (1952); Kramer and Kramer 89; Prosser and Keeton 261; Giesen 517.**

³⁴ **Prooth v Wallsh 105 Misc2d 608 432 NYS2d 663 (Sup 1980); Prosser and Keeton 261; Boumil and Elias 62.**

evidence which will neutralize any reasonable inference of negligence contradict it to such an extent that reasonable persons can no longer accept it. The nature of the defendant's evidence to neutralize the inference is obviously dependent on the strength of the inference. A defendant who convincingly shows that the accident was caused by some outside agency over which the defendant had no control, 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 is entitled to a directed verdict in his favour³⁵.

Where the defendant's evidence is to the effect that he exercised all reasonable care under the circumstances, 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 doctrine³⁶.

4.7 MEDICAL NEGLIGENCE CASES

³⁵ **Oliver v Union Transfer Co 17 694 71 SW2d 478 (Tenn App 1934); Lopes v Narragansett Electric Co 102 RI 128 229 A2d 55 (1967); Wagner v Coca-Cola Bottling Co SD 319 NW2d 807 (1982); American Village Corp v Springfield Lumber and Building Supply 269 Or 41 522 P2d 891 (1974); Town of Reasnor v Pyland Construction Co 229 NW2d 269 (Iowa 1975); Strick v Stutsman supra 148; Prosser and Keeton 261.**

³⁶ **Prooth v Wallsh supra 663; Prosser and Keeton 262.**

4.7.1 INTRODUCTION

As will appear from the case law *infra res ipsa loquitur* was initially not applied to medical negligence cases in the USA. Although there were various reasons for not applying the doctrine the requirement that the accident should not occur in the absence of negligence, provided the most important obstacle. Injuries in medical accidents may result from a variety of causal agents apart from the negligence of the defendant, for example the plaintiff's pre-existing medical condition.

The inherent high risk attached to certain medical interventions also often give rise to complications even though all reasonable care is exercised by the health care provider. The third reason for the reluctance to apply the doctrine to such cases was the fact that juries in medical actions would rarely be able to conclude that the injury was one that does not ordinarily occur in the absence of negligence, based on their common knowledge or common experience alone³⁷.

On the other hand the failure to apply the doctrine to medical negligence

³⁷ Ablin 1996 *Virginia L Rev* 332. See for example: **Hine v Fox 89 So2d 23 (Fla 1956)**; **Schockley v Payne 348 SW2d 775 (Tex Civ App 1961)**; **Lagerpusch v Lindley 253 Iowa 1033 115 NW2d 207 (1962)**.

cases would serve to increase the dilemma between the patient knowing nothing about the cause of the accident and the health care provider who ought to know or has access to the relevant facts ³⁸.

The standard of care used for evaluating conduct of the medical practitioner in a medical negligence case is usually established with expert medical evidence because the defendant's conduct is measured against a 'reasonable medical practitioner' standard and not a 'reasonable person' standard ³⁹. In this regard two problems present themselves. Firstly, the perceived reluctance among medical practitioners to testify against their colleagues and secondly, the plaintiff's inability to prove specific acts of negligence because of the fact that he is usually unconscious during treatment and therefore unable to determine the cause of his injury ⁴⁰.

³⁸ Giesen 516.

³⁹ Podell "Application of *Res Ipsa Loquitur* in Medical Malpractice Litigation" 1977 *Ins Council J* 634; De Lousanoff 285. See also for example: **Wallstedt v Swedish Hosp 220 Minn 274 19 NW2d 426 (1945); Beane v Perley 99 NH 309 109 A2d 848 (1954); Fehrman v Smirl supra 225; Studton v Stadnix 469 P2d 16 (Wyo 1970).**

⁴⁰ Podell 1977 *Ins Council J* 634.

In **Salgo v Leland Stanford Jr Univ Bd of Trustees** the court appraised the historical development of the application of the doctrine to medical negligence cases as follows:

“The application of the doctrine of *res ipsa loquitur* in malpractice cases is a development of comparatively recent years. Before that time, the facts that medicine is not an exact science, that the human body is not susceptible to precise understanding, that the care required of a medical man is the degree of learning and skill common in his profession or locality, and that even with the greatest of care untoward results do occur in surgical and medical procedures, were considered paramount in determining whether the medical man in given circumstance had been negligent. But gradually the courts awoke to the so-called “conspiracy of silence”. No matter how lacking in skill or negligent the medical man might be, it was almost impossible to get other medical men to testify adversely to him in litigation based on his alleged negligence. Not only would the guilty person thereby escape from civil liability for the wrong he had done, but his professional colleagues would take no steps to ensure that the same results would not again occur at his hands. This fact, plus the fact that usually the patient is by reason of anesthesia or lack of medical knowledge in no position to know what occurred that resulted in harm to him, force the courts to attempt to equalize the situation by in some cases placing the burden on the doctor of explaining what occurred in order to overcome an inference of negligence. One other fact contributed to the application of the doctrine, namely, that certain medical and surgical procedures became so common that in many of them the laymen knew that if properly conducted untoward results did not occur, and in others medical men (when it was possible to get them to admit it) from their specialized knowledge knew that without negligence the result would have been a good one”⁴¹.

⁴¹ **supra** 170. See for example with regard to the so-called “conspiracy of silence”: Ficarra 58; De Lousanoff 58; Giesen 513; Belli *Ready for the Plaintiff* (1963) 91.

Other factors which contributed to the increased judicial willingness to apply the doctrine to medical negligence cases were recognition that the jury in a growing number of cases were capable of determining negligent conduct without the aid of expert testimony, that the actual facts were more often than not within the knowledge of the medical practitioner and that the special fiduciary relationship between the doctor and the patient demanded that the doctor be required to explain what transpired during the treatment ⁴².

The courts have generally adhered to traditional requirements common to all negligence cases where the doctrine is applied and specifically limited the factual settings in medical context. As will be observed *infra*, the requirements of the doctrine has, as far as medical negligence is concerned, been modified to a certain extent but such modification must be considered as the natural growth of the doctrine and more particularly as a more natural employment of the doctrine through adaptation to a particular field of litigation ⁴³.

⁴² Podell 1977 *Ins Council J* 635; **Salgo v Leland Stanford Jr Univ Bd of Trustees** *supra* 170; **Ybarra v Spanguard** *supra* 687; **Klein v Arnold** 203 NYS2d 797 (Sup Ct 1960).

⁴³ Podell 1977 *Ins Council J* 636.

4.7.2 DOCTRINAL REQUIREMENTS IN MEDICAL CONTEXT

4.7.3 INTRODUCTION

In contra-distinction to the legal position in South Africa and England it appears that the courts in the USA have, to a certain extent modified the requirements for the application of the doctrine in medical negligence context. It is therefore necessary to consider such modifications in much more detail.

4.7.4 NEGLIGENCE IN MEDICAL CONTEXT

The general test for evaluating this requirement is whether in the light of ordinary experience of the layperson it can be inferred as a matter of common knowledge that the defendant has been negligent. This requirement obviously has a limiting effect on the application of the doctrine to medical negligence cases since medical conduct has traditionally been the subject of medical experts and not the layperson. It is generally accepted that the non-expert is unable to draw inferences or evaluate medical issues without the assistance of an expert. For this reason the doctrine's application in medical context was initially confined to 'blatant blunder' or obvious cases

where ‘circumstances seemed more amenable to lay judgement than to a purely professional one’⁴⁴.

Two rules influence the scope of the common knowledge requirement and are known as the ‘calculated risk’ and the ‘bad result’ rules, respectively. In terms of the ‘calculated risk’ rule, many courts have refused to apply the doctrine when the complications become a calculated or even expected risk of the intended medical procedure⁴⁵.

In this regard the reasoning appears to be that as soon as the defendant has proven that an accepted method of treatment involves inherent or material risks to the patient, it becomes impossible for the judge or the jury to determine whether there was negligence or whether the injury was unavoidable, without the aid of expert medical testimony. The ‘calculated risk’ rule can accordingly be successfully utilized by the defendant if he can produce expert evidence or statistics showing that the accepted method of

⁴⁴ Weiler *Medical Malpractice on Trial* (1991) 22; Podell 1977 *Ins Council J* 636; Ablin 1996 *Virginia L Rev* 333. Examples of obvious cases are retained surgical products in the patient’s body or the erroneous amputation of a healthy limb.

⁴⁵ **Ayers v Perray 192 F2d 181 (3rd Cir NJ 1951), Silverson v Weber 57 834 22 Cal Rptr 337 372 P2d 97 (Cal App 1962)**. See also Comment, “*Res Ipsa Loquitur and the Calculated Risk in Medical Malpractice*” 1956 *So Cal L Rev* 80.

treatment he employed, involved substantial or material risks to the patient⁴⁶.

The 'bad results' rule entails the principle that evidence of unsuccessful treatment or a 'bad result', without expert medical evidence, does not on its own constitute sufficient evidence to draw an inference of negligence⁴⁷.

More recent decisions are indicative of the approach that courts refuse to apply the 'bad results' rule. Yet proof of a bad result has even on occasion, by itself, been held sufficient, to justify the application of the doctrine on the basis that the 'bad result' would probably not have occurred without negligence⁴⁸.

The growing recognition that more sophisticated medical matters fall within the common knowledge of laypersons and the willingness of certain courts to employ medical experts for determining the applicability of the doctrine, has resulted in an increased utilization of the doctrine in medical negligence

⁴⁶ **Engelking v Carlson 13 Cal2d 216 88 P2d 695 (1939); Farber v Olkon 40 Cal2d 503 254 P2d 520 525 (1953).**

⁴⁷ See for example: **Olson v Weitz 37 Wash 2d 70 221 P2d 537 (1950); Robinson v Wirts 387 Pa 291 127 A2d 706 (1956); Rhodes v DeHaan 184 473 337 P2d 1043 (1959); Terhune v Margaret Hague Maternity Hosp 63 NJ Super 106 164 P2d 75 (App Div 1960).**

⁴⁸ See for example: **Olson v Wirts supra 537; Cho v Kempler 177 2d 342 2Cal Rptr 167 (Cal App 1960).**

cases. Podell suggests that the increased application of the doctrine in this context derives from an increased ability to apply the negligence test, rather than to a relaxation of traditional doctrinal requirements⁴⁹.

⁴⁹ Podell 1977 *Ins Council J* 637. Ablin (1996 *Virginia L Rev* 333 contra) states that the relaxation of this requirement as well as certain courts' willingness to allow *res ipsa loquitur* together with expert medical evidence allow plaintiffs to introduce expert evidence as to the first prong of *res ipsa loquitur* and then rely upon *res ipsa loquitur* to reach the jury, even though the jury would have to credit and rely on the experts' knowledge, rather than its own, to infer negligence. De Lousanoff 39 points out that if expert testimony is necessary to show not only what was done, but how and why, one can hardly say the 'thing speaks for itself'. Epstein "*Medical Malpractice: Its Cause and Cure*" 1978 *The Economics of Medical Malpractice* 245, 251) opines that this relaxation "shifted the wavy line between inevitable accident and culpable conduct so that the injuries once regarded as inevitable are today regarded as actionable". A commentator in "*The Application of Res Ipsa Loquitur In Medical Malpractice Cases* 1966 *Northwestern University L Rev* 852, 874 says that although this relaxation may be justified on social policy and ensures that a negligently injured plaintiff may recover, the danger of this policy is that it may have the unfortunate consequence of imposing liability in an inconsistent and arbitrary fashion because jurors are left to decide the question of liability without a meaningful standard if their common knowledge is not sufficient to determine the issue of negligence. See also: **Seneris v Haas supra 915**; **Mayor v Dowsett 240 Or 196 400 P2d 234 (1965)**; **Harris v Cafritz Mem Hosp 346 2d 135 (DC App 1977)**; **Perin v Hayne 210 NW2d 609 (Iowa 1973)**; **Walker v Rumer 72 Ill 2d 495 381 NE2d 689 (1978)**; **Parks v Perry 68 202 314 SE2d 287 (NC App 1984)**.

A further liberalization of the doctrinal requirements for the application of the doctrine is that some courts allow the plaintiff to both introduce evidence of specific acts of negligence, and to rely on the doctrine which is analogous to the simultaneous use of expert evidence and *res ipsa loquitur* discussed supra. 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 concession the plaintiff is able to avoid a nonsuit and to invite the jury to draw an inference of negligence against the defendant via the *res ipsa* instruction.

Ablin says the following in this regard:

“Although *res ipsa loquitur* was designed as a shield from nonsuit, employed in order for the plaintiff’s case to at least reach the jury, *res ipsa loquitur* is also now used as a sword: not only will the plaintiff’s case proceed to the jury, but the jury will be invited to draw an inference of negligence in the plaintiff’s favor via the *res ipsa loquitur* instruction. This offensive use of *res ipsa loquitur* truly appears to stack the deck in favor of medical malpractice plaintiffs, especially given a court’s and jury’s potential “hypnotic awe of the Latin words”, which are “treated as a special ritual fraught with mystery and magic”. The fact that plaintiffs rarely lose *res ipsa* cases that reach the jury suggests the power of extending an invitation to the jury to find for the plaintiff based on a Latin formula. Moreover, the issuance of a *res ipsa* jury instruction only further complicates the complex debate over the procedural effect of *res ipsa loquitur*” (footnotes omitted)⁵⁰.

⁵⁰ Ablin 1996 *Virginia L Rev* 335.

Ablin also refers to the case of **Daubert v Merrell Dow Pharmaceuticals 113 S Ct 2786 (1993)** where the Supreme Court ruled that the Federal Rules of Evidence superseded the stricter ‘general acceptance’ requirement for the admissibility of expert evidence so that a more liberal approach of admitting expert evidence is adopted wherever it will assist the trier of fact to understand the evidence or to determine a fact in issue. She says that this may have the effect that a plaintiff can now receive a *res ipsa loquitur* instruction and present a greater variety of expert evidence ⁵¹.

4.7.5 CONTROL IN MEDICAL CONTEXT

This requirement does not create any unique problems of application in medical negligence cases where a patient is treated by a single medical practitioner. The problems arise in modern surgical settings where “a complex organization of highly specialised, independent and interrelating members of the surgical process and pre- and postoperative periods of care are involved” ⁵².

⁵¹ Ablin 1996 *Virginia L Rev* 336.

⁵² Podell 1977 *Ins Council J* 641.

The majority of jurisdictions support the approach that the doctrine does not find application to multiple defendants unless vicarious or joint liability can be shown because the doctrine must point to a particular defendant and not a group of defendants within which the negligent defendant may be found ⁵³.

4.7.6 BASES FOR ALLOWING *RES IPSA LOQUITUR* AGAINST MULTIPLE MEDICAL DEFENDANTS

4.7.7 CONCURRENT CONTROL

The courts have applied the doctrine of *res ipsa loquitur* to facts which indicate that the defendants had concurrently exercised control over medical instrumentalities ⁵⁴.

4.7.8 *RESPONDEAT SUPERIOR*

Based on the principle of *respondeat superior* the courts have also allowed

⁵³ McCoid 1955 *Stan L Rev* 480; Podell 1977 *Ins Council J* 642; De Lousanoff 41.

⁵⁴ Teshima “*Applicability of Res Ipsa Loquitur in Case of Multiple Medical Defendants-Modern Status*” 67 *ALR* 4th 544; **Matlick v Long Island Jewish Hospital** 25 2d 538 267 NYS2d 631 (2d Dept App Div 1966); **Fogal v Genesee Hospital** 41 2d 468 344 NYS2d 552 (4th Dept App Div 1973); **Shields v King** 40 2d 57 317 NE2d 77 69 Ohio Ops 2d 57 317 NE2d 922 (Ohio App 1973 Hamilton Co); **Kolakowski v Voirs** 83 Ill2d 388 47 Ill Dec 392 415 NE2d 397 (1980).

the application of the doctrine to multiple defendants in medical negligence cases ⁵⁵.

4.7.9 THE ‘YBARRA’ RULE OF UNALLOCATED RESPONSIBILITY

The most significant departure from the majority approach with regard to the application of the exclusive control requirement to medical negligence cases was initiated by the judgment in **Ybarra v Spanguard** ⁵⁶. In this action the plaintiff developed paralysis and atrophy around the muscles of his shoulder after undergoing an appendectomy. The plaintiff sued his own doctor who had arranged the operation, the doctor who performed the operation, the anaesthetist and two nurses employed by the hospital as well as the doctor who owned and managed the hospital. The plaintiff was unable to establish negligence in respect of any individual and the court entered a judgment of nonsuit in favour of all the defendants.

⁵⁵ **Sherman v Hartman** 137 2d 589 290 P2d 894 (1st Dist Cal App 1955); **Frost v Des Moines Still College of Osteopathy & Surgery** supra 306; **Voss v Bridwell** 188 Kan 643 364 P2d 955 (1961); **Somerset v Hart** 549 SW2d 814 (Ky 1977); See however (contra): **Shutts v Siehl** 109 145 10 Ohio Ops 2d 363 164 NE2d 443 (Ohio App 1959 Montgomery Co); **Falcher v St. Luke’s Hospital Medical Center** 19 247 506 P2d 287 (Ariz App 1973); **Adams v Leidholt** 195 Colo 450 579 P2d 618 (1978).

⁵⁶ supra 445. See also *Furrow et al* 168ff.

On appeal the defendants argued that *res ipsa loquitur* could not be applied because, assuming that the patient's condition was caused by injury, there was no evidence to indicate that the act of any particular defendant nor any particular instrumentality caused the injury. The defendants also attacked the plaintiff's attempt to establish liability 'en masse' on various defendants some of whom were not responsible for the acts of others and also plaintiff's failure to indicate which defendants had control of the instrumentalities which may have caused the injury.

The court held that although it did not appear that any particular defendant had exclusive control or that it was more probable that the injury resulted from negligence on the part of each individual defendant, it relied on the defendants' superior knowledge and special relationship to apply the doctrine. The relevant portion of the judgement reads as follows:

“The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely no more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the

doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. (citation omitted) If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries in the course of treatment under anesthesia. But we think this juncture has not been reached, and that the doctrine of *res ipsa loquitur* is properly applicable to the case before us"⁵⁷.

It should be noted that the court recognised the different relationships between the defendants *inter se* but refused to take the view that the number of relationships of the defendants determines whether the doctrine could be applied or not. The court pointed out that every defendant in whose custody the plaintiff was charged for any period was bound to exercise ordinary care to ensure that no harm came to the plaintiff. The court placed the burden of initial explanation on the defendants because it concluded that the control at one time or another, of one or more of the various instrumentalities or agencies which may have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants⁵⁸.

⁵⁷ **supra 689.**

⁵⁸ **supra 690.** See also: McCoid 1955 *Stan L Rev* 480; Prosser and Keeton 252; De Lousanoff 41; Giesen 524; Harney 430; McClellan *Medical Malpractice: Law, Tactics, and Ethics* (1994) 35; Boumil and Elias 57; Furrow *et al* 169; 253ff *infra*.

The judgment in **Ybarra** has given rise to severe criticism but is followed by quite a number of jurisdictions ⁵⁹.

⁵⁹ Morris ““*Res Ipsa Loquitur*” *Liability Without Fault*” 1958 *Ins Council J* 97 103, says that the court was not applying *res ipsa loquitur* but a ‘rule of sympathy’ and warns against the extension of the doctrine to the point where an untoward result is the only required proof to require a defendant doctor to ‘run the gauntlet of judicial speculation, with disastrous consequences approaching financial ruin’. See also: Seavy, “*Res Ipsa Loquitur: Tabula in Neufragio* 1950 *Harv L Rev* 643, 648; Jaffe 1951 *Buff L Rev* 1 11; Adamson, “*Medical Malpractice: Misuse of Res Ipsa Loquitur* 1962 *Minn L Rev* 1043 1049. See however (pro) for example: Broder, “*Res Ipsa Loquitur In Medical Malpractice Cases*”, 1969 *DePaul L Rev* 421, 426; Podell opines as follows in this regard:

“The special responsibilities attending the doctor-patient relationship, especially pertinent to the surgical setting, justifies a continued adherence to the *Ybarra* view...Plaintiffs injured while unconscious during a surgical procedure are deprived of the very opportunity to obtain a medical expert unless the defendants reveal the facts. The *Ybarra* approach to the doctrine of *res ipsa loquitur*, then, can be viewed as a refusal by the courts to permit the extension of the ‘conspiracy of silence’ within the operating room where medical practitioners assume the highest degree of trust and responsibility towards the patient”. See also for example: **Oldis v La Societe Francaise de Bienfaisance Mutuelle** 130 2d 461 279 P2d 184 (1st Dist Cal App 1955); **Frost v Des Moines Still College of Osteopathy & Surgery** supra 306; **McCall v St Joseph’s Hospital** 184 Neb 1 165 NW2d 85; **Anderson v Somberg** supra 522; **McCann v Baton Rouge General Hospital** 276 So2d 259 (La 1973); **Jones v Harrisburg Polyclinic Hospital** 496 Pa 465 437 A2d 1134 (1981); **Swan v Tygett** 669 SW2d 590 (Mo App 1984); **Schaffner v Cumberland County Hospital System Inc** 77 NC App 689 336 SE2d 116 review den 316 NC 195 341 SE2d and review den 316 NC 195 341 SE2d 579 (1985); **Butti v Rollins** 133 2d 205 519 NYS2d 14 (2d Dept App Div 1987).

4.7.10 CONDITIONAL *RES IPSA LOQUITUR*

Ordinarily, and in cases where it is not difficult to ascertain whether the doctrinal elements have been established the presiding judge decides as a matter of law whether the doctrine of *res ipsa loquitur* is applicable to a particular case. In such cases the judge either instructs the jury as to the procedural effect which follows or nonsuits the plaintiff or directs a verdict for the defendant.

In cases, however, where it is problematic to establish whether the doctrinal requirements have been met, and where reasonable minds may differ on that issue the court employs a so-called ‘conditional’ *res ipsa* instruction to the jury in terms of which it is first to determine if the facts justify the application of the doctrine to the case. If the jurors conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine⁶⁰.

In **Seneris v Haas** the plaintiff suffered paralysis of both legs consequent to spinal anaesthesia during delivery of her child. She instituted proceedings

⁶⁰ De Lousanoff 48. See for example: **Quintal v Laurel Grove Hosp 62 Cal2d 154 41 Cal Rptr 577 397 P2d 161 (1964)**; **Tomei v Henning 67 Cal2d 319 62 Cal Rptr 9 431 P2d 633 (1967)** **Clark v Gibbons 66 Cal2d 399 58 Cal Rptr 125 (1967)**; **Schnear v Boldrey 99 Cal Rptr 404 22 CA3d 478 (1971)**.

against the obstetrician, the anaesthesiologist and the hospital. She was nonsuited at the trial and on appeal the Supreme Court reversed and held that where circumstances indicate a reasonable doubt as to whether a defendant's conduct falls within the parameters of ordinary care, such doubt must be resolved as a matter of fact rather than law ⁶¹.

⁶¹ **supra 924**. In this regard the court found: "The conclusion that negligence is the most likely explanation of the accident, or injury, is not for the trial court to draw, or to refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence even though the court itself would not draw that inference; the court must still leave the question to the jury where reasonable men may differ as to the balance of probabilities". De Lousanoff 49ff opines that the underlying rationale for this rule is that where the court has doubt in borderline cases whether the plaintiff has sustained his burden of proof, he will still have his chance by letting his case reach the jury. He then expresses the following concern: "However, it seems very problematic to transfer that rule to the question of applicability of *res ipsa loquitur*, even if it helps the plaintiff in medical malpractice cases. It is very much unlikely that the jury is capable to make a clear distinction between the question of applicability of the doctrine and its procedural effect. On the contrary, it appears much more probable that the jury, instructed on a conditional *res ipsa loquitur*, will not only decide whether the doctrine applies but also conclude the issue of negligence... For these reasons, it would be recommendable to leave the determination whether *res ipsa loquitur* is applicable to a particular case entirely for the judge. If he has doubts whether the doctrine may properly be invoked *res ipsa loquitur* should be applied. According to the general rule in negligence cases it should be for the jury then to decide how strong is the implication of negligence. The distinction between a conditional and an unconditional *res ipsa loquitur* instruction implies an unnecessary risk of confusion among the jurors and appears very likely to be prejudicial for the outcome of the particular case". See also Trucco "*Conditional Res Ipsa Loquitur in Illinois Medical Malpractice Law: Proof of a Rare Occurrence as a Basis for Liability-Spidle v Steward*" 1981 *DePaul L Rev* 413.

4.8 ABSENCE OF CONTRIBUTORY NEGLIGENCE IN MEDICAL CONTEXT

Where, in a medical negligence action the court finds that there is a possibility that the plaintiff behaved in such a manner as to contribute to his own injury the doctrine of *res ipsa loquitur* is not applied against the parties who administered the treatment⁶². The advent of comparative fault acts, converts the plaintiff's contributory fault from the traditional barring of liability to one of reducing damages to the *pro rata* degree of fault of the plaintiff⁶³.

4.9 EVIDENCE MUST BE MORE ACCESSIBLE IN MEDICAL CONTEXT

This controversial fourth requirement for the application of *res ipsa loquitur* has found limited application in medical context⁶⁴.

⁶² See for example: **Hornbeck v Homeopathic Hospital Asso 57 Del 120 197 A2d 461 (Super 1964)**; **Kitto v Gilbert 39 374 70 P2d 544 (Colo App 1977)**; **Mayor v Dowsett supra 234**; **Holmes v Gamble 655 P2d 405 (Colo 1982)**; **Emerick v Raleigh Hills Hospital - Newport Beach supra 92**.

⁶³ See fn 18 supra.

⁶⁴ **Seneris v Haas supra 915**; In **Wells v Woman's Hospital Foundation 286 So2d 439 442 (La App 1973)** the court for example found: "This testimony stands unrefuted and thus the only other source of information to explain the presence in plaintiff's abdomen of an additional odioform gauze pad must lie in the hands of those responsible for the medical treatment of plaintiff at the time the gauze packing was supposed to have been removed".

4.10 STATUTORY REGULATION OF THE DOCTRINE IN MEDICAL CONTEXT

State legislatures also have the authority to regulate the application of the doctrine of *res ipsa loquitur*. During the 1970's, and in response to an increasing number of medical negligence claims, many states enacted legislation for the purpose of reducing the number of malpractice claims. A number of these statutes limit or have abolished the application of the doctrine in, malpractice cases⁶⁵.

The Alaska statute for example prevents a plaintiff from relying on the doctrine of *res ipsa loquitur* to reach the jury if no direct evidence of negligence is produced⁶⁶. In Tennessee the applicable statute creates a rebuttable presumption of the defendant's negligence when the instrumentality is in the exclusive control of the defendant and the injury does not ordinarily occur in the absence of negligence⁶⁷.

⁶⁵ Eldridge "Torts – North Carolina expands the Application of Res Ipsa Loquitur in Medical Malpractice: Parks v Perry" 1986 Wake Forest L Rev 537 547.

⁶⁶ ALASKA STAT § 09. 55. 540 (b) (1983).

⁶⁷ Tenn Code Ann § 29-26-115 (c). See also for example: Cal Evidence Code § 646; NC gen Stat § 90-21.12 (1985); DEL CODE ANN tit 18, § 6853; (Cum Supp 1984); NEV REV STAT § 41a 100.

4.11 CASE LAW

4.11.1 INTRODUCTION

In the USA there is a plethora of reported authorities on the application of the doctrine to medical negligence cases and it is therefore possible to categorize such cases in medical context. To facilitate a comparative survey between the English and USA case law⁶⁸ and to keep the reference to USA case law within manageable bounds, the categorization follows the English headings in Chapter 3 supra. An attempt is also made to highlight the general trends reflected by these authorities and where possible also to allude to so-called landmark decisions on the subject.

4.11.2 RETAINED SURGICAL PRODUCTS

The doctrine finds frequent application to so-called 'foreign object' cases where for example a surgical instrument is left behind in the patient. It is argued that a medical layman is competent enough to decide the negligence issue in such a factual setting without the aid of expert testimony.

⁶⁸ Due to the dearth of reported authorities on the application of the doctrine to medical negligence cases in South Africa it is obviously not possible to categorize such authorities in a similar fashion.

In **Johnson v Ely**⁶⁹ the plaintiff instituted an action against Dr Ely alleging that he had left a needle in the plaintiff's abdomen during an appendectomy. The court found in favour of the defendant but on appeal the court *inter alia* found that if the needle entered through the incision during the operation and the wound was closed without removing it, the doctrine applies and in the absence of reasonable explanation the jury may infer negligence. It found that where the inferences of negligence which arise under the doctrine are rebutted by opposing evidence, the weight of the inference is for the jury to decide and in the absence of reasonable and successful explanation the jury may infer negligence.

The court further held that under *res ipsa loquitur*, where the inferences of negligence are rebutted by opposing evidence, the weight of the inference is for the jury unless uncontradicted explanatory evidence excludes the inference that the injury arose from want of ordinary care. Explanations showing that the injuries might have occurred from some other cause not attributable to the defendant's negligence is not sufficient to take the case to the jury⁷⁰.

The plaintiff in **Wells v Woman's Hospital Foundation**⁷¹ alleged that she

⁶⁹ 30 294 205 SW2d 759 (Tenn App 1947).

⁷⁰ See also **Bowers v Olsch** 260 P2d 997 (1953) (leaving of a needle in the abdomen, *res ipsa loquitur* applied. See however **Anderson v Somberg** *infra* where a different approach was adopted.

⁷¹ *supra* 439.

suffered damages because of a retained gauze pad inside her abdomen following treatment for an infected abdominal incision. The court found in favour of the defendant and on appeal it was held that the doctrine of *res ipsa loquitur* was applicable to the action, that the plaintiff was not contributory negligent, that the state was vicariously liable to the plaintiff under the doctrine of *respondeat superior* and that there was no abuse of discretion. With regard to the doctrine of *res ipsa loquitur* the court stated that the untoward or unusual event was not the placement of the odioform gauze pad inside the plaintiff but the failure of the attending doctor or doctors to remove it, before discharging the plaintiff. The Court of Appeal confirmed the judgment.

Joyce Easterling instituted an action against Dr Walton in **Easterling v Walton**⁷² to recover damages for injuries sustained through the alleged negligence of the defendant in failing to remove a laparotomy pad from her abdomen after completion of the operation. The trial court held that *res ipsa loquitur* was not applicable. On appeal the court held that the doctrine was applicable under the facts of the case. It found that the plaintiff's evidence showed that while she was in an unconscious state the defendant was in control of the operation as the 'captain of the ship'.

⁷² 208 Va 214 156 SE2d 787(1967) 791.

The inadvertent failure of the defendant to remove the lap pad from the plaintiff's abdominal cavity before closing the operation wound constituted such an act or omission in the performance of the duty owed to plaintiff that a layman could infer negligence without the aid of expert testimony. The plaintiff's evidence warranted an inference of negligence which should have been left to the jury and the court found that it was an error for the trial court to withdraw this question from their consideration.

In **Chapetta v Ciaravella**⁷³ the plaintiff underwent a total abdominal hysterectomy. Subsequent to the operation she became nauseated and vomited for several days. Eight days after the operation she was surgically opened once again and it was discovered that a laparotomy pad had been retained in the first operation. On appeal the court found that the application of the doctrine of *res ipsa loquitur* was proper and with regard to the defendant's explanation stated that the burden was upon the defendant to affirmatively establish his use of diligence and reasonable care together with his best judgment in the treatment of the patient. It found further and as a corollary, that the defendant was under a burden to negative his negligence.

⁷³ 311 So2d 563 (La App 1975).

It held that the defendant had not exculpated himself of negligence by a preponderance of the evidence.

A medical negligence action was brought in **Turney v Anspaugh**⁷⁴ where a surgical sponge was retained in the plaintiff's body following a hysterectomy and it was removed in a subsequent operation. The court found in favour of the plaintiff against the first defendant and on appeal the judgment was confirmed.

In its judgement the Court of Appeal referred with approval to the opinion in **St John's Hospital & School of Nursing v Chapman**⁷⁵ where the court held that *res ipsa loquitur* was a rule of evidence only and that the inference of negligence was rebuttable by a satisfactory explanation offered by the defendant. The weight of the rebuttable evidence offered by the defendant to overcome the inference of negligence is for the jury to decide. In this regard it held that unless all reasonable minds are bound to reach the same conclusion, it is the jury, in a jury trial, that is to determine whether or not the explanation offered by the defendant is satisfactory to overcome the

⁷⁴ 581 P2d 1301 (Okla 1978).

⁷⁵ 434 P2d 160 (Okla 1967).

inference of negligence, even though the defendant's evidence may be undisputed.

In **Mudd v Dorr**⁷⁶ a husband and wife instituted an action against a surgeon for damages suffered by Mrs Mudd as a result of the alleged retention of a cottonoid sponge after an operation. On appeal, Berman J found that when, during surgery, a foreign object such as a sponge is lost in a patient, a *prima facie* case of negligence is made out under the doctrine of *res ipsa loquitur* and the burden falls upon the defendant to prove that because of the general nature or particular nature or particular circumstances of the surgery such apparent misfeasance was not negligent.

He further held that as the evidence established all the requisite conditions, the trial court's refusal to instruct on the doctrine of *res ipsa loquitur* and its direction of a verdict for the defendant because of plaintiff's failure to present expert evidence was an error. He also held that the court's instruction that unless there is expert evidence concerning the question as to what constitutes the standard of care of a reasonably prudent physician,

⁷⁶ 40 74 574 P2d 97 (Colo App 1977).

the plaintiff cannot prevail, was also erroneous. The judgment was accordingly reversed and remanded with directions.

Dr Hicken in **Nixdorf v Hicken**⁷⁷ repaired the plaintiff's cystocele and rectocele and also performed an amputation of a portion of the cervix. During the procedure one of the curved cutting needles used to suture the torn diaphragm became disengaged from the needle holder and although he attempted to retrieve it, he was unsuccessful. The defendant failed to inform her about the retained needle and when she was informed about its presence years later, she instituted an action for damages against him. Maughan J, writing for a divided court (Crockett, Wilkens and Hall JJ concurring, Stewart J dissenting in part and concurring in part) *inter alia* held as follows:

“The evidence presented at the trial indicates the instrumentality which caused the bad result was in the exclusive control of the defendant at the time of the accident. Furthermore, the plaintiff was under a general anesthetic and could not participate or contribute to the act causing the injury. These facts when combined with the nature of the accident provide a sufficient evidentiary foundation for the application of the *res ipsa loquitur* doctrine in this case. The application of the doctrine provides a rebuttable inference of negligence which will carry the plaintiff's case past the motion of nonsuit.”

⁷⁷ **612 P2d 348 (Utah 1980) 353**. See also: Comment, “*Failure to Remove Surgical Instruments Held to Raise Inference of Res Ipsa Loquitur*” 1981 *Utah L Rev* 169 236.

In **Tice v Hall**⁷⁸ the plaintiff underwent hernia surgery after which a surgical sponge was retained and discovered years later. Martin J held that the evidence of the defendant and his expert concerning the scrupulous sponge counting and recounting procedures employed by the surgical team in that, and other cases and the reliance of the surgeons on the sponge-count provided by nurses in assistance, does not absolve the surgeon from his duty to remove all harmful and unnecessary foreign objects at the completion of the operation. The presence of a foreign object therefore raises an inference of lack of due care.

The plaintiff in **Sullivan v Methodist Hospitals of Dallas**⁷⁹ instituted an action against the hospital and the doctor when a sponge was retained in her abdomen after a caesarian section. On appeal the judgment was reversed and remanded, Kennedy J holding *inter alia* with regard to *res ipsa loquitur*, that the doctrine is seldom applied to medical negligence cases in Texas because it frequently raises issues which fall beyond the knowledge of laymen. He continued to state that **Texas** courts had, prior to 1977, held that in certain

⁷⁸ 310 NC 589 313 SE2d 565 (1984).

⁷⁹ 699 SW2d 265 (13 Dist Tex App 1985).

circumstances the plaintiff did not have to prove that the doctor's diagnosis was negligent and the proximate cause of the plaintiff's injuries. This holding had specifically been applied to circumstances involving the leaving of surgical instruments or supplies inside the body of the patient.

In **Anderson v Somberg**⁸⁰ the cup of an angulated pituitary rongeur broke off while the instrument was being manipulated in the plaintiff's spinal channel during a back operation. The surgeon attempted to retrieve the object but was unable to do so and the operation was terminated. The retained object caused complications and further medical intervention was required. The plaintiff instituted proceedings against the surgeon, the hospital, the manufacturer of the instrument and the supplier. In this instance the court noted that the doctrine had been expanded to encompass cases where the negligent cause was not the only or most probable theory in the case, but where alternate theories of liability accounted for the only possible causes of injury. In such cases the court required the defendants' to come forward and tender their evidence, providing a development which represents a substantial deviation from earlier conceptions of *res ipsa loquitur*.

⁸⁰ **supra 338**. See also: PCK "Torts – Medical Malpractice – Procedural Effect of Res Ipsa Loquitur" 1976 *Tennessee L Rev* 502ff; De Lousanoff 29.

The plaintiff in **Prooth v Wallsh**⁸¹ instituted an action against the defendant after undergoing heart by-pass surgery where a surgical clamp had inadvertently been left in his chest cavity. During the operation, the patient's heartbeat became critically erratic and although the surgical team had discovered that a clamp was missing, the chief surgeon decided to close and suture the patient's chest immediately because time was of the essence and his life had to be saved.

The plaintiff satisfied the burden of presenting a *prima facie* case of negligence by establishing the presence of the clamp in his chest, entitling him to a charge based on *res ipsa loquitur*. The defendants tendered substantial evidence explaining why the clamp had been retained and under these circumstances the jury may have concluded that the presence of the clamp resulted from an emergency situation and as such might or might not have been negligent.

⁸¹ **supra 663**. For additional examples see also: **Tiller v Von Pohle** 72 Ariz 11 230 P2d 213 (1951); **Mondat v Vallejo General Hospital** 152 2d 588 313 P2d 78 (Cal App 1957); **Johnston v Rhodis** 151 F Supp 345 (DC Dist Col 1957); **Sherin v Lloyd** 246 NC 363 98 SE2d 508 (1957); **Swanson v Hill** 166 F 296 Supp (DC ND 1958); **Williams v Chamberlain** 316 SW2d 505 (Mo 1958).

4.11.3 ANAESTHETICAL PROCEDURES

Errors in anaesthesiology often lead to morbidity, mortality, or serious physiological injury. Although a victim of an anaesthetic accident may be at a disadvantage in proving how the injury occurred because of unconsciousness or lack of familiarity with medical practices or substances, circumstances accompanying the injury may be of such a nature as to raise a presumption or create an inference of negligence on the part of the anaesthetist ⁸².

In **Ybarra v Spanguard** ⁸³ the plaintiff underwent an appendectomy. When he awakened from the anaesthetic he felt a sharp pain about halfway between his neck and his right shoulder. The pain subsequently spread down to the lower part of his arm and he later developed atrophy and paralysis of the muscles around the shoulder. In an appeal against a judgment of nonsuit the plaintiff was successful and the judgment was reversed. With regard to the requirement of exclusive control when the doctrine of *res ipsa loquitur* is applied, Gibson CJ found that a patient is likely to come under the care of a number of persons in different types of contractual and other relationships

⁸² Koenders “*Medical Malpractice: Res Ipsa Loquitur In Negligent Anesthesia cases*” 49 ALR 63.

⁸³ **supra 687**. See also fn 84 infra.

with each other, in a modern hospital. He went on to state that either the number or the nature of the relationships alone determine whether the doctrine of *res ipsa loquitur* applies or not. In this regard the court found that every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him, and that each of these defendants would be liable for any failure in this regard.

The defendants' employers would be liable for the neglect of their employees and the doctor would be liable for those who became his temporary servants for the purpose of assisting in the operation. The court concluded by holding that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had control over his body or the instrumentalities which may have caused the injuries may properly be called upon to meet the inference of negligence by explaining their conduct ⁸⁴.

⁸⁴ For further discussion of the case see also: Rubsamen "*Res Ipsa Loquitur in California Medical Malpractice Law - Expansion of a Doctrine to the Bursting Point*" 1962 *Stan L Rev* 251 255; Eaton "*Res Ipsa Loquitur and Medical Malpractice in Georgia: A Reassessment*" 1982 *Georgia L Rev* 33 67ff; Dalquist "*Common Knowledge In Medical Malpractice Litigation: A Diagnosis and Prescription*" 1983 *Pacific L J* 133 141 FF; Green "*Physicians and Surgeons: Res Ipsa Loquitur and Medical Malpractice in Oklahoma*" 1986 *Oklahoma L Rev* 539 543. See also 198-201 **supra** and 258-260 **infra**.

In **Horner v Northern Pacific Beneficial Asso**⁸⁵ the plaintiff underwent a hysterectomy and when she regained consciousness she found that her right arm was paralysed. The hospital gave no explanation with regard to the cause of the injury other than to show that this type of paralyses might be produced by some form of trauma, pressure or traction while the patient is under anaesthesia. The plaintiff relied on the doctrine of *res ipsa loquitur* successfully and the hospital appealed. The court stated that where the requirements of *res ipsa loquitur* are met it is not essential for the plaintiff to lead further evidence of negligence to take the case to the jury.

The court reasoned that to emerge from abdominal surgery with a paralysed arm was such an extraordinary event, within the general experience of mankind as to raise an inference of negligence, which requires both an explanation and proof of negligence to meet. The court further held that as the other requirements for the application of the doctrine were met the verdict was supported by the evidence.

Mrs Seneris in **Seneris v Haas**⁸⁶ instituted an action against her obstetrician, anaesthetist and the hospital for damages due to paralyses after administration of the anaesthetic. The court entered a judgment of nonsuit

⁸⁵ **supra 518.**

⁸⁶ **supra 915.** See also: 197 **supra**; Harney 432.

and the plaintiff appealed. The judgment of nonsuit against the obstetrician was affirmed but reversed as to the anaesthetist and the hospital. The court alluded to the general principles applicable to the application of the doctrine.

In **Salgo v Leland Stanford JR University Board of Trustees**⁸⁷ the plaintiff suffered paralysis of his lower extremities after undergoing a translumbar aortography. On appeal the judgment of the court that it had been a prejudicial error to instruct as a matter of law that an inference of negligence arose under the circumstances, was reversed. With regard to the application of the doctrine of *res ipsa loquitur* the court highlighted the following dilemma:

“The great difficulty in the application of the doctrine is to determine where to draw the line. To apply it to all cases where an unexpected result occurs would hamstring the development of medical science. No medical man would dare to use new procedures, especially in surgery, because if injury resulted he would be prima facie guilty of negligence...Thus a great responsibility rests upon the courts to determine the point at which the doctrine will apply in order to be fair to the patient who has received a result which either common knowledge of laymen or of medical men teaches ordinarily would not occur without negligence, and to be fair to medical men if there is a result which could occur without negligence and which should not impose upon them the presumption of negligence”.

⁸⁷ **supra 154 170**. See also: Rubsamen 1962 *Stanford L Rev* 260; Pegalis and Wachman *American Law of Medical Malpractice* (1981) 102; Harney 432.

The plaintiff in **Quintal v Laurel Grove Hospital**⁸⁸ suffered a cardiac arrest during minor surgery as a result of which he became a spastic paraplegic, blind and mute because of severe brain damage. The jury returned verdicts against both doctors and the hospital, but motions for judgments notwithstanding the verdict, and in the alternative, a new trial was awarded all defendants. In referring to the conditional *res ipsa loquitur* the court stated that the facts of the case represented a clear situation where the conditional *res ipsa loquitur* finds application. If the jury found facts, which they were entitled to find from the evidence, the doctrine had to apply. In *casu* it was an injury which was very rare, and which may have resulted from negligence. The question was whether it was more probable that it resulted from negligence or not.

The plaintiffs, from the evidence of the defendants and their witnesses proved that the injury could have occurred as a result of negligence. In such circumstances the jury should be instructed that if they find certain facts to be true they should apply the inference involved under *res ipsa loquitur*. In this case the injury involved a known risk which rarely occurs. The instrumentality and the procedures involved were under exclusive control of

⁸⁸ **supra 161**. See also Harney 436.

exclusive control of the defendants and the plaintiff anaesthetized. Such circumstances called for an explanation. The defendants' explanation consisted of what they did and that their actions represented due care. There was testimony that 90 percent of deaths occurred as a result of faulty intubation. There was also evidence that would justify the jury in inferring that if the operation had been performed and three minutes of cardiac arrest ensued there would have been no brain damage. Other evidence established that there were erasures on the temperature chart. The court held that under such circumstances the test was whether the jury could find that it was more probable than not that the injury was the result of negligence.

A spinal anaesthetic was administered to the plaintiff in **Mayor v Dowsett**⁸⁹ during childbirth as a result of which the plaintiff suffered paralysis. In a subsequent action for damages against Dr Dowsett the trial court entered a judgment for the defendant and the plaintiff appealed. The Court of Appeal reversed the judgment and with regard to the application of the doctrine of *res ipsa loquitur* found that on a motion for a directed verdict all the

⁸⁹ **supra 234.**

evidence, whether introduced by the plaintiff or the defendant is to be considered and the plaintiff is entitled to the benefit of every legitimate inference which may be drawn from the evidence. In *casu* the court found that the evidence was to the effect that the requirements for the application of the doctrine were met.

In **Edelman v Zeigler**⁹⁰ the plaintiff instituted an action on behalf of his wife, who had suffered an extensive brain injury as a result of cardiac arrest allegedly caused by the administration of anaesthesia. In this instance the plaintiff alleged specific acts of negligence to support his claim. The jury reached a verdict in favour of the defendant anaesthetist and the plaintiff appealed, arguing that the trial court should have instructed the jury that if they could find that the injury was of a kind that ordinarily does not occur in the absence of negligence, they were entitled to make an inference of negligence.

The Court of Appeal reversed the trial court's decision, holding that the doctrine of *res ipsa loquitur* could be based on specific acts of negligence.

⁹⁰ 44 Cal Rptr 114 122 (1965). See also: **Morgan v Children's Hospital 18 Ohio St3d 185 18 Ohio Br 253 480 NE2d 464 (1985); Brown v Dahl 705 P2d 781 (Wash App 1985).**

The court found that the allegations of specific acts of negligence did not weaken but rather fortified the claim to a *res ipsa loquitur* instruction.

The plaintiff in **Herbert v Travellers Indemnity Co.**⁹¹ allegedly suffered permanent injury after being anaesthetised during an operation. The medical experts agreed that the pain and sensation of electric shock from which he suffered emanated from the spinal needle used during the anaesthetic procedure, coming into contact with a nerve root. In their evidence the medical experts were *ad idem* that it was contrary to the professional standards of the community to inject spinal anaesthesia directly into the nerve roots and that it was never knowingly done. The object was to inject the anaesthetic drug into the fluid of the spinal cord and ‘bathe’ the nerve roots in the anaesthetising solution.

In view of this evidence the court stated that the trial court should instruct the jury that if they find that the anaesthetising agent was injected directly into the nerve root and it probably would not have happened without some fault on the part of the defendant, and that they must then evaluate the defendant’s evidence and decide whether he has sufficiently explained his

⁹¹ 239 So2d 367 (La App 1970).

conduct to exculpate himself. The court further stated that the defendant testified about what techniques he used and what precautions he took in administering the anaesthetic. The expert witnesses agreed that the methods employed by the defendant met the required standard. Under the circumstances the jury's judgment as to the question of the defendant's possible exculpation on the evidence would largely depend on their evaluation of him as a witness.

In **Clark v Gibbons**⁹² the plaintiff instituted an action against a surgeon and an anaesthetist for injuries sustained when a spinal anaesthesia wore off prematurely. Although the level of anaesthesia remained adequate at first, the doctors noticed from the plaintiff's unconscious movements that the anaesthesia was beginning to wear off. The anaesthetist testified that the Demorol could have been used to extend the unconscious state of the plaintiff, and that there was no particular reason not to use it, but that the extension it could achieve may have still been insufficient to complete the operation.

⁹² **supra** 525. See also Harney 437.

The operation was in fact terminated prematurely and the operative report indicated the circumstances under which the operation terminated prematurely. As a result of the incomplete operation the plaintiff suffered from painful arthritis in the ankle joint. The plaintiff charged the anaesthetist with negligence in selecting and administering the anaesthetic which wore off before completion of the operation and the surgeon for not informing the anaesthetist that the operation could last longer than two hours.

The jury returned a verdict in favour of the plaintiff and the defendants appealed both on the bases that the verdict was not supported by sufficient evidence of negligence and that the trial court committed a reversible error by giving a conditional *res ipsa loquitur* instruction to the jury.

On appeal the court recognised that when a medical practitioner performed an act which caused an injury which did not ordinarily occur in the absence of negligence, it increased the probability that negligence caused the injury. The court concluded that the evidence on the whole was sufficient for the

jury to find that the injury was probably the result of the negligence of the medical practitioners. The court affirmed the trial court's decision that the facts of the case warranted the use of a conditional *res ipsa loquitur* instruction.

The plaintiff in **Younger v Webster**⁹³ instituted an action against the defendant doctor for loss of sensory feeling from his navel to his knees after undergoing hernia surgery during which spinal anaesthesia was administered to him. The court held that the plaintiff was entitled to the application of the doctrine of *res ipsa loquitur* because he submitted himself to the custody and care of medical personnel, was rendered unconscious and received some injury from instrumentalities used in his treatment.

The court stated that without the application of the doctrine, a patient who received injuries of a serious nature caused by someone's apparent negligence, would be unable to recover damages unless the doctors and nurses in attendance chose to disclose the facts establishing liability.

⁹³ 9 87 510 P2d 1182 (Wash App 1973).

In **Funke v Fieldman**⁹⁴ the plaintiff sustained nerve damage as a result of the administration of a spinal anaesthetic. She testified that she experienced extreme pain during the initial procedure and told the doctor that she thought something was wrong because she could still feel sensation in her legs. The needle was then removed and reinserted in a different position. When the anaesthesia wore off paralysis remained on the left side with total loss of sensation to pain and reduced sensitivity to touch.

The trial court found that the doctrine of *res ipsa loquitur* was not applicable to the case. The Court of Appeal upheld the trial court's judgment in respect of the application of the doctrine and stated that in its opinion the administration of spinal anaesthesia which results in permanent nerve damage to the patient is a procedure which is so complicated, considering the delicate anatomy of the human spine and the various possibilities of the injury from the needle or anaesthetic solution, as to lie beyond the realm of common knowledge and experience of laymen as to whether such a result would not ordinarily occur in the absence of negligence.

⁹⁴ 212 Kan 524 512 P2d 539 (1973).

In **Pederson v Dumouchel**⁹⁵ the plaintiff failed to awaken from a general anaesthetic for almost a month after surgery with apparent brain injury. The court refused an instruction to the jury on the doctrine of *res ipsa loquitur* and the jury rendered a verdict in favour of the defendants. On appeal the court held that the doctrine was in fact applicable as negligence could be inferred when the general experience and observation of mankind is such that the result would not be expected without negligence.

The plaintiff in **Cangelosi v Our Lady of the Lake Regional Medical Center**⁹⁶ sustained a fracture of two cartilage rings in his trachea during or after gallbladder surgery. This later resulted in sixteen surgical procedures to reduce the continual growth of scar tissue and to maintain an adequate airway. The plaintiff also had a permanent tracheostomy as a result of the tracheal condition. At the trial the plaintiff presented the expert testimony to establish that a traumatic injury occurred during the insertion of the tube or during the 53 hours of intubation and that substandard medical care was more probably than not, the cause of the injury.

The defendants presented evidence to establish that tracheal stenosis may

⁹⁵ 72 Wash 2d 73 431 P2d 973 (1967).

⁹⁶ *supra* 1009.

occur in the absence of substandard medical care and that *perichondritis*, an inflammation which slowly develops and dissolves the cartilage in the tracheal rings, was an equally plausible non negligent explanation for the tracheal stenosis. The trial judge, noting that the plaintiff had solely relied upon *res ipsa loquitur* and had presented no direct evidence of substandard care, granted a directed verdict in favour of the defendants and dismissed the case. On appeal the court stated that the standard to be applied by the trial judge in deciding whether to instruct the jury on *res ipsa loquitur* is the same standard used in deciding whether to grant a directed verdict, namely, whether the facts and inferences point so strongly and overwhelmingly in favour of one party that reasonable men could not arrive at a contrary verdict. It further stated that if reasonable minds could reach different conclusions on whether the defendant's negligence caused the plaintiff's injury, the judge must present the issue to the jury and instruct the jury on the doctrine of *res ipsa loquitur*.

The court held that the evidence indicating that the injury was caused other than by the defendant's negligence is at least equally plausible as the evidence that it was caused by the defendants' negligence. The plaintiff had

accordingly failed to prove that, more probably than not, his injury was caused by any defendant in this case and affirmed the judgment of the trial court.

In **Welte v Mercy Hospital**⁹⁷ the plaintiff was admitted to the hospital for surgery on her nose and was unintentionally burned on her arm when an anaesthetic that was to be injected into her vein, infiltrated the surrounding tissue. An action was instituted against the anaesthetist and the hospital for the alleged negligence in the administration of the anaesthetic and failure to procure the plaintiff's informed consent. The court granted partial summary judgment against the anaesthetist with regard to the general negligence claim and summary judgment in favour of the defendants upon jury verdicts, against which the claimants appealed.

With regard to the trial court's granting of partial summary judgment on the general negligence claim the court held that the record established

⁹⁷ **supra 437 441**

circumstances of the occurrence sufficient to defeat summary judgment without the necessity of leading expert medical evidence as follows:

“The chemical burn to Welte’s arm was caused by sodium pentothal that Dr Bello injected into her vein which then infiltrated or escaped from the vein into the surrounding tissues. We believe it is within the common experience of laypersons that such an occurrence in the ordinary course of things would not have happened if reasonable care had been used. The insertion of a needle into a vein is a common medical procedure that laypersons understand. It is a procedure which has become so common that laypersons know certain occurrences would not take place if ordinary care is used”.

The judgment was accordingly reversed and remanded.

The plaintiff in **Wick v Henderson, Mercy Hospital and Medical Anesthesia Associates**⁹⁸ underwent gallbladder surgery. Post-operatively she felt pain in her left arm upon awakening. Upon discharge from the hospital she was told that the arm was ‘stressed’ during surgery. It was ascertained later that she had suffered permanent injury to the ulnar nerve located in her upper left arm. She instituted an action against the defendants claiming damages for a disfiguring scar as a result of corrective surgery, pain and past and future medical expenses. With regard to the requirement of

⁹⁸ **supra 645.**

exclusive control when the doctrine of *res ipsa loquitur* is applied the court stated that an examination of recent cases revealed that the test for actual exclusive control of an instrumentality had not been strictly followed, but exceptions had been recognised where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. It held that the test had become one of the right to control rather than actual control⁹⁹.

⁹⁹ See also: Koenders 49 *ALR* 4th 63ff; Levine “*Anesthesia - Accidents and Errors*” 1969 *De Paul L Rev* 432; Blumenreich “*The Doctrine of Res Ipsa Loquitur*” 1987 *AANA* 13; Butterworth *et al* “*Transient Median Nerve Palsy After General Anesthesia: Does Res Ipsa Loquitur Apply?*” 1994 *Anesth Analg* 163; Liang and Coté “*Speaking For Itself: The Doctrine of Res Ipsa Loquitur in a Case of Pediatric Anesthesia*” 1996 *J Clin Anesth* 399. For additional cases of the application of *res ipsa loquitur* to anaesthetical procedures see for example: **Barker v Hearn** 82 SW 417 (Tex Civ App 1935); **Dierman v Providence Hospital** *supra* 12; **Cavero v Franklin General Benev Soc** 36 Cal2d 301 223 P2d 471 (1950); **Luy v Shinn** 40 Hawaii 198 (1953); **Frost v Des Moines Still College of Osteopathy & Surgery** *supra* 306; **Surabian v Lorenz** 229 2d 462 40 Cal Rptr 410 (5th Dist Cal App 1964); **Oberlin v Friedman** 5 Ohio St2d 1 34 Ohio Ops 2d 1 213 NE2d 168 (1965 Lucas Co); **Dunlap v Marine** 242 2d 162 51 Cal Rptr 158 (2d Dist Cal App 1966); **Bardesonno v Michels** 3 Cal3d 780 91 Cal Rptr 760 478 P2d 480 45 ALR 3d 717 (1970); **Thorp v Corwin** 260 Or 23 488 P2d 413 (1971); **Wiles v Myerly** 210 NW2d 619 (Iowa 1973); **South West Texas Methodist Hospital v Mills** 535 SW2d 27 writ ref nre (Tex Civ App Tyler 1976); **Ewen v Baton Rouge General Hospital** 378 So2d 172 cert den (La) 385 So2d 268 (La App 1st Cir 1979); **Guzman v Faraldo** 373 So2d 66 cert den (Fla) 383 So2d 1195 (D3 Fla App 1979); **McKinney v Nash** 120 3d 428 174 Cal Rptr 642 (3rd Dist Cal App 1981); **Thomas v St Francis Hospital Inc** 447 A2d 435 (Del Sup 1982); **Parks v Perry** *supra* 142; **Morgan v Children’s Hospital** *supra* 464.

4.11.4 GENERAL SURGICAL PROCEDURES

In some cases involving injuries which result from surgical procedures the doctrine has been held applicable on the basis that from the facts and the evidence it appeared that the injury would not have occurred in the absence of negligence on the part of the defendant.

In **Mayers v Litow**¹⁰⁰ the plaintiffs instituted an action against the doctor and the hospital for alleged medical negligence arising from a thyroidectomy performed on the plaintiff and during which her recurrent laryngeal nerve was allegedly severed. The trial court entered judgments of nonsuit and the plaintiffs appealed. The Court of Appeal affirmed the judgment in favour of the hospital but reversed the judgment against the doctor. The court held that the evidence raised a question of fact as to whether or not the defendant, Dr Litow, exercised reasonable care in conducting the operation on the plaintiff, and found that the plaintiffs' evidence is sufficient to submit to the jury, under proper instructions, the question of the applicability of the doctrine of *res ipsa loquitur*.

In **Fehrman v Smirl**¹⁰¹ the plaintiff instituted an action against the surgeon

¹⁰⁰ **154 2d 413 316 P2d 351 (Cal App 1957)**. See also: Holder "Res Ipsa Loquitur" 1972 *JAMA* 121; Harney 432.

¹⁰¹ **supra 255**.

alleged permanent incontinence and sexual impotence after a prostatectomy. The circuit court dismissed the claim and the plaintiff appealed. The Court of Appeal reversed the judgment and remanded for a new trial. With regard to the question as to whether *res ipsa loquitur* could be properly invoked in a medical negligence action the court held that it would seem that situations may arise in medical negligence cases where the doctrine of *res ipsa loquitur* may be properly invoked. It held further that this did not however mean that an instruction embodying *res ipsa loquitur* is proper in every medical malpractice case.

The plaintiff in **Silverson v Weber**¹⁰² suffered a vestigovaginal fistula after undergoing a hysterectomy. She did not present expert testimony at the trial and the defendant's evidence was to the effect that although it is regarded as a rare complication, a fistula of that nature following a hysterectomy might have several causes other than the surgeon's negligence. The trial court did not instruct the jury on *res ipsa loquitur* and on appeal the court held that to permit an inference of negligence under the doctrine of *res ipsa loquitur* merely because an uncommon complication develops would place to great

¹⁰² **supra 97.**

a burden upon the medical profession and might result in an undesirable limit on the use of operations and new procedures involving an inherent risk of injury, even when due care is used.

In **Tomei v Henning**¹⁰³ the defendant performed a hysterectomy on the plaintiff during which he accidentally sutured her right ureter in two places. The accident was not discovered until four days later. Corrective surgery by an urologist was unsuccessful and the plaintiff's right kidney had to be removed. At the trial the defendant admitted that he unintentionally sutured the ureter but presented evidence to the effect that the misplacing of the sutures and the failure to discover it during the operation was an unavoidable accident and not the result of negligence on his part.

The trial court entered a judgment for the defendant on the complaint and a judgment for the plaintiff on the cross-complaint, against which both the defendant and the plaintiff appealed. In reversing the judgement Traynor CJ held with regard to the application of a conditional *res ipsa loquitur* that under a *res ipsa loquitur* instruction it could ask whether it is more likely than not that when such an accident occurs, the surgeon is negligent. Since the verdict was reached without the benefit of a *res ipsa loquitur* instruction,

¹⁰³ **supra 633**. See also Harney 440.

it established that the jury could not find negligence along the first route and could not identify any specific negligent conduct. Had the instruction been given, however, the jury might reasonably have concluded that regardless of how the accident might have happened or how it could have been avoided, its happening alone supported an inference of negligence. The court concluded that it was reasonably probable that a result more favourable to the plaintiff could have been reached if the instruction had been given.

The plaintiff in **Fraser v Sprague**¹⁰⁴ appealed from a judgment of nonsuit in an action arising from an operation performed by the defendant for the removal of the lesser saphenous vein. After the operation the plaintiff suffered from an impairment of the common peroneal nerve. With regard to the application of the doctrine of *res ipsa loquitur* Associate Judge Tamura stated as follows:

“...The evidence of extreme rarity coupled by the following additional evidence was sufficient to entitle to have the cause submitted to the jury under a conditional *res ipsa loquitur* instruction: the operation was relatively commonplace rather than complex or unusual; at the time he recommended surgery, defendant made no mention of risk of nerve injury. There was expert testimony that the injury would have been unlikely had the operation been performed with due care; There was expert

¹⁰⁴ 270 2d 736 76 Cal Rptr 37 (Cal App 1969) 43. See also Harney 442.

testimony that the size of the incision made by the defendant would have required 'vigorous' use of retractors in the proximity of the injured nerve; there was expert testimony that overtight bandaging was the probable cause of the injury; the defendant admitted that it was probable that the peronial nerve was bruised during surgery and the bruising during the course of the surgical procedure in question is avoidable by observing 'proper surgical precautions'; the plaintiff was furnished extensive post operative and physical therapy treatments without charge. The foregoing evidence was sufficient to permit the jury to draw an inference of negligence from the fact of the accident".

The judgment was accordingly reversed.

In **Dacus v Miller**¹⁰⁵ the plaintiff instituted an action against her surgeon after allegedly suffering an injury to her facial nerve during a radical mastoidectomy revision. The circuit court entered judgment for the defendant and the plaintiff appealed. The Supreme Court held that expert evidence to the effect that if due care were exercised injury to the facial nerve would not ordinarily occur, was sufficient to authorize submission of *res ipsa loquitur* to the jury but affirmed the trial court's finding to refuse to submit a requested instruction to the jury thereon, where the complaint at the time of submission of the case to the jury allegedly only specified

¹⁰⁵ 257 Or 337 479 P2d 229 (1971).

negligence and the requested instruction failed to limit the jury from inferring negligence in the particulars alleged in the complaint.

Severe and permanent injuries to her hands were sustained by Mrs Walker in **Walker v Rumer**¹⁰⁶ after undergoing a bilateral *palmar fasciectomy*. The trial court entered an order dismissing one count of the complaint and the plaintiff appealed. The appellate court reversed and remanded and the defendant's petition for leave to appeal was granted. The Supreme Court affirmed the judgment and with regard to the 'common knowledge' requirement in respect of the application of the doctrine of *res ipsa loquitur* stated that the defendant's argument that the doctrine of *res ipsa loquitur* could not be applied because the bilateral palmar fasciectomy performed in this case was not a 'common place' surgical procedure with which the average person is familiar and able to understand, indicated a misapprehension of the relationship between 'common knowledge' exceptions to the requirement of proof by expert testimony in medical malpractice cases and the doctrine of *res ipsa loquitur*.

¹⁰⁶ **supra 689**. See also Harney 440.

The requirement for *res ipsa loquitur* according to the court, was not that the surgical procedure be ‘commonplace’ or that the ‘average person’ should be able to understand what is involved but rather that the determination which must be made as a matter of law is whether the occurrence is such as in the ordinary course of things would not have happened if the party exercising control or management had exercised proper care. That determination may rest either upon the common knowledge of layman or expert Testimony.

Edward Kolakowski in **Kolakowski v Voris**¹⁰⁷ claimed damages in the circuit court of Cook County from his physicians and the Mercy Hospital after allegedly suffering impaired function of his cervical spine cord following an operation to remove a disc from his spine. He lost use of his limbs and became quadraplegic. The circuit court granted the hospital’s motion for summary judgment and the plaintiff appealed. The Supreme Court affirmed the Appellate Court’s judgment to reverse and remand. With regard to the requirement of exclusive control the court found in *casu*, that the plaintiff at the time of the alleged injury was placed in the care and custody of the named defendants and since the plaintiff was under a general anaesthetic during surgery he was unable to ascertain the cause of his

¹⁰⁷ **supra 1003**. See also Harney 442.

injuries. The cause was in the exclusive knowledge of the defendants. It was under these circumstances that the plaintiff's only recourse had been to rely on the doctrine of *res ipsa loquitur*. The theory advanced by the defendant was that whenever a doctor acting in the capacity of an independent contractor, participates in surgery in the defendant's hospital, the element of control ceases. The court indicated that this approach was regarded as manifestly unfair because doctors and the hospital, at the time of surgery, each owed an independent duty to the patient and exercised concurrent control over the operation and equipment.

It found that when a patient submits himself to the care of a hospital and its staff and is rendered unconscious for the purpose of surgery performed by an independent contracting surgeon, the control necessary under *res ipsa loquitur* would have been met. The burden will then shift to the hospital to dispel the inference that it exercised the control necessary for the application of *res ipsa loquitur*¹⁰⁸.

¹⁰⁸ For additional examples of the application of the doctrine to surgical procedures see also: **Emrie v Tice 174 Kan 739 258 P2d 332 (1953)**; **Belshaw v Feinstein 258 2d 711 65 Cal Rptr 788 (Cal App 1968)**; **Rawlings v Harris 265 2d 452 71 Cal Rptr 288 (Cal App 1968)**; **Cline v Lund 31 3d 755 107 Cal Rptr 629 (Cal App 1973)**; **Faulkner v Pezeshki 44 2d 186 337 NE2d 158 (Ohio App 1975)**; **Anderson v Gordon 334 So2d 107 (Flo App 1976)**; **Miller v Kennedy 91 Wash 2d 155 588 P2d 734 (1978)**; **Holloway v Southern Baptist Holiday 367 So2d 871 (La App 1978)** ; **Kennis v Mercy Hospital Medical Center 491 NW2d 16 (1992)** **Iowa Sup LEXIS 388 (1992)**; **Vogler v Dominguez and Deaconess Hospital Inc 642 NE2d 56 Ind App LEXIS 1472 (1993)**.

4.11.5 DENTAL PROCEDURES

In a number of cases involving injury to the plaintiff consequent to dental procedures plaintiffs have sought to rely on the doctrine.

In **Vergeldt v Harzell**¹⁰⁹ the dentist was working with an electric drill on the plaintiff's teeth when it slipped, penetrating the floor of the plaintiff's mouth, lacerating her tongue and otherwise causing serious injury. In this instance the court found that the requirements for the application of the doctrine had been met in that the apparatus was such that no injurious result would ensue without carelessness by the user. The equipment was under the exclusive control of the defendant at the time and the plaintiff did not contribute in any way to her injury. The court also stated that the defendant's ability to know the true cause of the accident was greatly superior to that of the plaintiff.

The plaintiff in **Razin v Zimmerman**¹¹⁰ developed an abscess on her chin as a result of infected teeth. The x-ray machine which was used to secure a picture of the teeth caused severe burns. The court held that this kind of injury would not have happened if those who had the management exercised

¹⁰⁹ 1 Fed (2d) 633 (1924).

¹¹⁰ 206 Cal 723 276 Pac 107 (1929).

due care. It also found that that everything which contributed to the accident was under the control of the defendant.

In **Whetstine v Moravec**¹¹¹ the root of a tooth was allowed to slip down the plaintiff's throat and passed into plaintiff's right lung. The court found that all the instrumentalities, including the body of the plaintiff, was under the exclusive control of the defendant. There was an occurrence which should not have occurred in the ordinary course of teeth extraction if due care had been exercised. There was no explanation by the defendant and because of the plaintiff's unconscious state, he had no idea what had happened. Under such circumstances the court found that the doctrine of *res ipsa loquitur* was applicable and a jury would be warranted in inferring therefrom that the plaintiff's injury was caused by the defendant's negligence.

4.11.6 INJECTIONS

As a general proposition the breaking of a hypodermic needle or other instrument during its use, is usually not sufficient, in itself, to render the doctrine applicable, since the break may be caused by some other factor other than the improper use of the instrument.

¹¹¹ **228 Iowa 351 291 NW 425 (1940)**. See also Athur 1944 *SALJ* 217ff

In **Horace v Weyrauch**¹¹² the defendant had attempted to give the plaintiff an intravenous injection of an iodine dye for the purpose of performing a pyelogram. The defendant was unable to administer the injection intravenously and gave the injection subcutaneously into the plaintiff's left hip. The plaintiff suffered considerable pain and an ulcer later developed at the site of the injection which was subsequently excised by surgery. Expert evidence was led at the trial that it was good medical practice to give such an injection subcutaneously when it could not be given intravenously.

Further evidence was to the effect that unfavourable reactions to such subcutaneous injections were not rare but were a risk inherent therein, being caused by sensitivity of the individual patient to the iodine dye. The court held that it was doubtful in this case whether the doctrine would be applicable to the facts and that it depended on the question as to whether the layman could say as a matter of common knowledge or observation, or could draw a reasonable inference from the evidence, that the consequences of the injection were not such as would ordinarily follow if due care had been exercised.

¹¹² 159 2d 833 342 P2d 666 64 ALR 2d 1276 (Cal App 1958).

The court found in this regard that the expert evidence supported the view that it was good medical practice to give the injection subcutaneously in such circumstances and that there was no basis for the plaintiff's contention that there was an inference of negligence because the injection was given subcutaneously. Moreover the complications which ensued were known risks to the treatment. As a result of a conflict with regard to other evidence the court however held that the case should have gone to the jury.

The plaintiff in **Williams v Chamberlain**¹¹³ instituted an action against the defendant alleging *inter alia* that he broke a needle while attempting to inject a tetanus anti-toxin into the plaintiff's spinal canal and allowed the needle to remain in the plaintiff's back for 27 days before removing it. In this instance the court found that the breaking of a hypodermic needle did not in itself bespeak negligence and that they could break as a result of various causes. Such a break could therefore occur in spite of all the care and skill which a doctor or dentist employs.

In **Van Zee v Souix Valley Hospital**¹¹⁴ the plaintiff injured his left hand and forearm when it was caught in the spokes of a blender. After having

¹¹³ **supra** 505.

¹¹⁴ **315 NW2d 489 (SD 1982)**. See also Regan "*Res Ipsa Loquitur Doctrine must be considered in Determining Negligence*" 1982 *Hospital Progress* 59.

been taken to hospital the injury was x-rayed, cleaned and sutured. Due to the severity of the injuries the plaintiff was taken to Souix Valley Hospital where he underwent surgery.

After discharge from the hospital the plaintiff experienced severe and persistent pain in his right arm to the extent that it nearly became immobile. The plaintiff alleged that he received an injection while he was unconscious during the surgery at the hospital which caused the pain and nerve damage to his right arm. The circuit court entered a judgment based on the jury verdict that the hospital was not negligent and the plaintiff appealed. The Supreme Court held that the evidence was sufficient to create a reasonable inference that the hospital was negligent and that such negligence was responsible for causing damage to the right arm. An instruction on the doctrine of *res ipsa loquitur* was therefore required and the court accordingly reversed the judgment and remanded for a new trial.

In **McWain v Tuscan General Hospital**¹¹⁵ the plaintiff alleged that he suffered an injury to his sciatic nerve after an injection was negligently administered by a nurse employee of the defendant. Summary judgment was

¹¹⁵ **670 P2d 1180 (Ariz App 1983).**

entered against the plaintiff and he appealed. The court found that before the doctrine of *res ipsa loquitur* could be applied there must first be evidence

that a negligent act of the defendant was more likely to have caused the injury than any other cause. The court stated that in *casu* there was no such evidence. It found that the method of giving an injection, the site of the injection or the drug prescribed, are the proper subjects of medical experts to assist a lay jury in determining the facts. The burden was on the appellant to establish a standard of care and to prove a deviation from that standard by expert medical testimony unless the deviation is so grossly apparent that a layman would have no difficulty in recognising it ¹¹⁶.

The plaintiff in **Wood v United States** ¹¹⁷ suffered a cerebrovascular stroke when a surgeon unintentionally injected Teflon paste into his carotid artery. At the time the plaintiff was undergoing a procedure known as a Teflon injection into the nasopharynx to treat his patent (open) eustachian tube. On the day following the procedure the plaintiff could not move his right arm or leg and the right side of his mouth was drooping. Doctors at the time,

¹¹⁶ *supra* 1180.

¹¹⁷ 838 F2d 182 (6th Cir 1988).

suspected that he had suffered a stroke and subsequent tests confirmed their diagnoses. The United States District court found in favour of the defendants and the plaintiff appealed. The Court of Appeal *inter alia* found that the doctrine of *res ipsa loquitur* did not raise a presumption of negligence under Tennessee law, where the proper procedure was clearly not within the common knowledge of a lay person and where the plaintiff presented evidence of specific acts of negligence ¹¹⁸.

4.11.7 INFECTION

It is generally held, in accordance with the 'bad result' rule that the mere fact that a patient develops an infection in the area under treatment does not raise a presumption or inference of negligence on the defendant's part.

In **Rimmele v Northridge Hospital Foundation** ¹¹⁹ the plaintiff instituted proceedings against the doctors, nurses and hospital for medical negligence after suffering infection as a consequence of negligent administration of injections in her buttock. Judgment was granted in favour of the defendants and the plaintiff appealed.

The Court of Appeal found that where doctors neither administered the

¹¹⁸ See also **Gaston v Hunter** 121 33 588 P2d 326 (Ariz App 1978).

¹¹⁹ 46 3d 123 120 Cal Rptr 39 (Cal App 1975). See also Harney 439.

injections nor were the principal of any nurse who administered any injection, they were not liable for malpractice. It further found that the jury seemed to question whether the hospital had exclusive control and that the *res ipsa loquitur* instruction leaving questions of exclusive control and patient's negligence to the jury was prejudicially erroneous. The court affirmed in part and reversed in part with Hanson J dissenting.

In **Folk v Kilk**¹²⁰ the plaintiff instituted an action against the hospital, internist and otorhinolaryngologist, to recover damages resulting from a brain abscess which became manifest five days after the plaintiff underwent a tonsillectomy. The Superior Court granted a judgment of nonsuit in favour of the hospital and a directed verdict in favour of the doctors. The plaintiff appealed against the trial court's refusal of a *res ipsa loquitur* instruction.

The Court of Appeal affirmed the trial court's holding that in view of the medical evidence that the performance of a tonsillectomy, without first determining whether a prevailing *haemophilus influenza* or other bacteria were present in plaintiff's throat, was not a violation of the prevailing standard of care and the failure to take a throat culture in sufficient time to obtain its results before embarking on the surgery, did not constitute a

¹²⁰ 53 3d 176 126 Cal Rptr 172 (Cal App 1975). See also Harney 439.

negligent act which in view of the rarity of a brain abscess after a tonsillectomy, would warrant the giving of a conditional *res ipsa loquitur* instruction ¹²¹.

4.11.8 DUTY OF CARE

The doctrine of *res ipsa loquitur* has also on occasion found application to circumstances where the plaintiff alleged that the defendant had breached a duty of care.

In **Meier v Ross General Hospital** ¹²² the widow of a decedent who had committed suicide, instituted an action against the doctor and hospital for wrongful death. The Superior Court entered a judgment for the doctor and the hospital and the plaintiff appealed.

The Supreme Court per Tobriner J, held that the duty of care of the hospital and others with regard to the treatment and care of the mentally ill and the

¹²¹ See also: **Pink v Slater** 131 2d 816 281 P2d 272 (Cal App 1955); **Valentine v Kaiser Foundation Hospitals** 194 2d 15 Cal Rptr 26 (Cal App 1961); **Wilson v Stillwill** 92 227 284 NW2d 773 (Mich App 1979).

¹²² 69 Cal2d 420 423 71 Cal Rptr 903 445 P2d 519 (1968). See also Holder "Res Ipsa Loquitur" 1972 JAMA 1587.

fact that the doctor placed the decedent on the second floor following an attempted suicide (with a fully openable window through which the decedent jumped), permitted the jury to find that the doctor and the hospital more probably than not, had breached their duty of care to the decedent, even in the absence of expert testimony, since the accident was not inextricably connected with the course of the treatment involving the exercise of medical judgment beyond the knowledge of laymen. Under the circumstances the court reversed the judgement and remanded for a new trial.

In **Emerick v Raleigh Hills Hospital - Newport Beach**¹²³ the plaintiff was undergoing alcoholic rehabilitative treatment and was heavily medicated. Her condition and course of treatment required a higher degree of care than that owed by land occupiers generally. The sink fell when the plaintiff sat or leaned on it and the trial court entered judgment in favour of the doctor and the hospital.

On appeal it was found that it should have been anticipated that the plaintiff might lean or place her weight on bathroom fixtures. With regard to the doctrine of *res ipsa loquitur* the court *inter alia* said the following:

¹²³ **supra 92.**

“It can be said with equal force here that no satisfactory explanation is offered by the hospital as to why a properly installed sink would fall under the admitted facts here. There is competent evidence, and common sense compels its belief, that a properly installed bathroom sink will withstand more than 20 to 50 pounds of pressure. Thus the inference is that the accident would not have occurred absent a defective installation of the sink. This evidence gives rise to the reasonable inference of neglect, the sine qua non to the application of *res ipsa loquitur*.”

The court accordingly reversed the judgment¹²⁴.

4.12 LEGAL OPINION

4.12.1 INTRODUCTION

Widely diverging views are expressed by commentators in the USA with regard to the application of the doctrine of *res ipsa loquitur* to medical negligence cases and similar to the tendency reflected in reported authorities on the subject, there is certainly no unanimity concerning it. In

¹²⁴ See also for example: **Kopa v United States 236 F Supp 189 (Hawaii 1964)**; **Duncan v Queen of Angels Hospital 11 3d 655 Cal Rptr 157 (Cal App 1970)**; **Sellars v Presbyterian Intercommunity Hospital 277 Or 559 P2d 876 (1977)**; Regan “*Proof of Reasonable Care Defends Hospital in Case Based on Res Ipsa Loquitur Theory*” 1983 *Hospital Progress* 62.

this regard Adamson says the following:

“Since *res ipsa loquitur* is the offspring of miscegenation between evidence and negligence, it, like its kissing cousin, the presumption, is of a very mixed blood indeed. It is part logic, part emotion, and part expediency. Apparently it has a “spirit” which controls its activities in a general sort of way. It is at once a helpful friend and an unbeatable foe. No wonder there is no unanimity concerning it”¹²⁵.

4.12.2 UTILITY OF THE DOCTRINE IN MEDICAL NEGLIGENCE CASES

Commentators are, generally speaking, *ad idem* that the application of the doctrine to medical negligence cases is limited. The reason for that is that it is a well settled rule that doctors are no warrantors of care and that bad results ensue despite the exercise of due care and skill¹²⁶. Another reason advanced in this regard is that the negligence of a doctor should be proved by way of expert testimony and not by a mere inference so that the jury can arrive at an intelligent conclusion based on a scientific exposition of the subject matter¹²⁷.

¹²⁵ Adamson 1962 *Minn L Rev* 1044.

¹²⁶ Shane 1945 *SALJ* 289; De Lousanoff 22.

¹²⁷ Podell 1977 *Ins Council J* 635.

One commentator states that certain recurrent factual elements support the application of the doctrine to medical negligence cases and although they may or may not be present in a given medical negligence action, their absence will not necessarily bar the use of the doctrine. The first element is the availability of evidence explaining the plaintiff's injury ¹²⁸.

The second factual element is the location of the plaintiff's injury. In this regard the commentator points out that in a large number of medical negligence cases, the doctrine has been applied to circumstances where the injury complained of, affected areas of the plaintiff's body which are remote from the area under immediate attention by the medical personnel during the procedure ¹²⁹.

¹²⁸ Comment, "*Res Ipsa Loquitur: A case for Flexibility in Medical Malpractice*" 1970 *Wayne L Rev* 1136 1144. In this regard he says: "Usually plaintiff asserts superior access by the physician, but since *res ipsa loquitur* is viewed as a substitute for the allegation and proof of specific, proximate and negligent acts or omissions by the defendant-physician, it is reasonable to require the plaintiff to prove the defendant's superior access even though the patient may have suffered injuries that "speak for themselves"...The physician may have superior knowledge of medical matters generally, and may have voluntarily assumed a position of special confidence and trust to his patient; but it does not necessarily follow that the physician should be prevented from effectively asserting a good faith objection to the application of *res ipsa loquitur* where he has no greater access to explanatory evidence".

¹²⁹ *Ibid* 1145.

The final factual element concerns the state of consciousness or sensitivity of the plaintiff when the alleged negligent act occurred. Injury suffered in a state of unconsciousness or insensitivity induced by medical anaesthesia reduces the plaintiff's ability to produce specific evidence of negligence. He further submits that if there is an absence of the three elements discussed above, the doctrine of *res ipsa loquitur* should not find application even if the traditional requirements are met. In this regard he states:

“Although other policies favoring application of *res ipsa loquitur* in medical malpractice cases may outweigh each of these elements alone, it is suggested that in combination they present sufficient reason to alter this balance. Likewise, the courts could rely on the lack of any of the three to apply *res ipsa loquitur* where the traditional requirements are met. This would be consonant with the view of several commentators that application of *res ipsa loquitur* should not depend upon a wooden test, but rather in part upon the particular facts involved. The traditional requirements afford considerable subjective, factual analysis, and the need for an additional test to expand the analysis depends in part upon the practical effect of *res ipsa loquitur*”¹³⁰

4.12.3 RES IPSA LOQUITUR, COMMON KNOWLEDGE AND EXPERT MEDICAL OPINION

Traditionally, expert medical evidence was required to prove negligence

¹³⁰ Ibid 1146.

against medical defendants. The doctrine of *res ipsa loquitur*, when it finds application to medical negligence cases, allows juries to infer negligence from the circumstances surrounding the injury ¹³¹. Eaton states that it is incongruous to allow a lay jury to infer a proposition which generally demands expert proof, but that the policies which underlie these seemingly inconsistent positions may be reconciled without any compromise to either position ¹³².

It would seem that the modern trend is to allow both a *res ipsa loquitur* instruction and expert medical evidence in medical negligence cases ¹³³.

¹³¹ Eaton 1982 *Georgia L Rev* 33 42; De Lousanoff 38.

¹³² Eaton 1982 *Georgia L Rev* 43.

¹³³ Ablin 1996 *Virginia L Rev* 327 328. In this regard she states: “thus, a judge’s use of a three-word Latin phrase to express the simple concept that certain accidents “speak for themselves” has engendered a much more expansive doctrine, one that has opened a “Pandora’s box of misunderstandings by the courts” (perhaps *because* it was first expressed in Latin). In particular, it has found its way in the field of medical malpractice, giving plaintiffs a powerful weapon with which to prevail in their negligence claims. The use of *res ipsa loquitur* in medical malpractice cases is particularly potent because of the special difficulties of establishing negligence in that context. Thus, as one judge has asserted, “[t]he ‘thing speaking for itself’ has taken on a life of its own multiplying in the field of medicine with the self assurance of a crusader”.

The common knowledge doctrine permits juries to evaluate the reasonableness of a medical defendant's conduct without the aid of expert testimony in cases where the alleged act or omission does not involve the exercise of medical skill or judgment and those cases where the common knowledge and experience of the jury allow them to determine the reasonableness of the medical care provided ¹³⁴. Joint application of the doctrine of common knowledge and *res ipsa loquitur* allows the jury to infer negligence from the injury purely on the basis of its common knowledge ¹³⁵.

¹³⁴ Eaton 1982 *Georgia L Rev* 47 48-49. In this regard he states that: "There are also cases in which the jury is permitted to evaluate the defendant's exercise of medical skill and judgment without the benefit of expert evidence. These cases involve the common knowledge doctrine. The premise of the common knowledge doctrine is that the "facts, although connected with medicine, are so well known as not to require expert testimony to place them before the jury, or where the case concerns matters which juries must be credited with knowing by reason of common knowledge." The common knowledge doctrine has most frequently been applied in the so-called foreign-objects and remote-traumatic-injury cases. If the defendant surgeon failed to remove a sponge or other foreign object from the patient, a jury may find that the defendant was negligent even in the absence of expert testimony...The trend in some jurisdictions is to expand the types of cases suitable for treatment under the common knowledge doctrine. When this is done, the availability of *res ipsa loquitur* is correspondingly expanded".

¹³⁵ Dahlquist 1983 *Pacific L J* 133 141. See also Hirsh *et al* 1985 *Med Trial Tech Q* 410ff.

The expansion of the doctrine of *res ipsa loquitur* with regard to the fact that the plaintiff is permitted to rely on the doctrine and tender expert medical testimony with regard to both negligence and opine whether the type of accident was one which would ordinarily not occur in the absence of negligence, has met with both positive and negative responses from commentators¹³⁶.

Ablin states that although some courts accept that a plaintiff may utilize expert opinion to persuade the jury that facts ‘speak for themselves’, this is not the case at all. She says that it is rather a case where the experts are speaking for the facts. The jury is then invited by the judge to find negligence by means of a *res ipsa loquitur* instruction. She submits that the doctrine is not only ill-suited for cases where expert evidence is required before the jury may make a negligence finding, but that it is as equally foreign to the jury as the original injury¹³⁷.

¹³⁶ See fn 49 supra.

¹³⁷ Ablin 1996 *Virginia L Rev* 347 348. A further aspect which she criticises is the perceived sympathy of the jury towards the plaintiff. In this regard she states: “By increasing the probability that the jury will reach a feelings-based result, instructing the jury on *res ipsa loquitur* also increases the risk of an erroneous negligence finding. This is due in part to the jury’s tendency to let its sympathy for the plaintiff influence its verdict more than it should. It is also due, however, to the fact that the jury is not relying on its own basis of common experience to infer negligence, as it should in *res ipsa* cases, but rather on the testimony of plaintiff’s medical experts that the defendant was negligent”.

4.12.4 *RES IPSA LOQUITUR* AND THE ELEMENT OF CONTROL

The exclusive control requirement for the application of the doctrine of *res ipsa loquitur* presents difficulties for the plaintiff in cases where multiple defendants are involved, particularly in medical context. The majority of courts have refused to apply *res ipsa loquitur* where the plaintiff could only show that he had been injured by one or the other of a group of defendants unless vicarious liability or joint control could be shown. The departure from this majority view, initiated by the controversial **Ybarra** case has provoked a divergence of opinion from commentators.

McCoid says that in the **Ybarra** case the court required a retrial of an action to claim damages for an injury which the plaintiff allegedly suffered at the hands of several doctors and nurses while unconscious. At the retrial the defendants presented expert evidence to the effect that the injury to the defendant was more probably caused by infection than of traumatic origin. Apart from this apparent denial of negligence, each defendant testified to the fact that while he or she was present, nothing occurred which could have

caused the injury. He states that the trial court apparently disbelieved the first explanation of the defendants and as to the second felt that the defendants may have honestly failed to appreciate what happened to the plaintiff during the course of the procedure. He submits that since the trial court sat as a trier of fact it is not clear whether it found as a matter of law that neither form of rebuttal was legally sound or that, as a matter of fact, neither explanation was believable ¹³⁸.

Giesen is of the opinion that **Ybarra** as far as the element of control is concerned has shifted the burden of proof to multiple defendants which he considers appropriate in the light of the responsibility for the plaintiff's safety undertaken by everyone concerned ¹³⁹.

Seavy on the other hand states that to extend the doctrine to a situation where a series of people are *seriatim* in control or in partial control of the plaintiff and where the injury could have been caused by any one of them unobserved by the others, is to use the doctrine to accomplish a result

¹³⁸ McCoid 1955 *Stan L Rev* 496.

¹³⁹ Giesen 524.

without reference to the reasons for it or its limitations. He further opines that it is not equitable to impose liability upon a group of defendants where it is evident that the injury was not the result of group action and most members of the group were innocent of any wrongdoing ¹⁴⁰.

One commentator states the following with regard to the **Ybarra** case:

“The *Ybarra* doctrine represents willingness to impose liability on several innocent defendants in order to provide recovery for the injured patient. If the defendants, among themselves, can determine the person at fault, only that person will pay. Otherwise innocent parties may be required to contribute compensation for the wrong of another...It may be that patients injured during medical treatment should not go uncompensated. But compensation for these injuries should not be based on a system of arbitrary liability. If all such injuries are to be compensated, the states should legislatively impose a system of social insurance; if the fault concept of liability is to be preserved, the courts must be willing to limit recovery to cases where the patient can clearly prove that the physician was at fault” ¹⁴¹.

4.12.5 THE CONDITIONAL *RES IPSA LOQUITUR*

In terms of the conditional *res ipsa loquitur* the court employs an instruction

¹⁴⁰ Seavy 1950 *Harv L Rev* 648. See also fn 59 supra.

¹⁴¹ Comment 1966 *The Northwestern University L Rev* 874-875.

to the jury in terms of which it is first to determine if the facts justify the application of the doctrine of *res ipsa loquitur* to the case. If the jurors' conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine. Eldridge submits that this application of the doctrine is unique in two ways. Firstly, it allows a jury to be instructed on the application of *res ipsa loquitur* even if proof of specific acts of negligence is present. Secondly, it allows the jury, and not the court, to determine whether the doctrine applies. In this regard he states that the probability element of the doctrine is based on either common knowledge of the community or expert testimony, and are questions of law. The theory of conditional *res ipsa loquitur* places these questions in the hands of the jury, contrary to the general rule¹⁴².

Trucco points out that the application of the conditional *res ipsa loquitur* in California has been limited to cases involving medical procedures that are within the common knowledge of the jury. Where complex medical issues are at stake the probabilities of negligence cannot be established solely by reference to the common knowledge of the jury. He states that the case of

¹⁴² Eldridge 1986 *Wake Forest L Rev* 537 550-551.

Spidle v Steward has the effect of allowing the application of an equivalent of a conditional *res ipsa loquitur* to litigation involving a complex medical procedure¹⁴³. He says that the **Spidle** majority did not explicitly recognise the applicability of a conditional *res ipsa loquitur*, but by holding that evidence of the rarity of an occurrence together with specific acts of negligence, required submission of the probability element to the jury, had the effect of applying an equivalent of a conditional *res ipsa loquitur*.

He submits that by allowing the jury to determine the applicability of the doctrine prior to drawing an inference of negligence, provides no safeguards against the jury determining the ultimate issue of negligence without addressing the threshold issue of probability upon which an inference of negligence is contingent. He states further, that because **Spidle** substantially alleviates a plaintiff's burden of proof in medical negligence cases, the *onus* of proof is effectively placed on the defendant to conclusively prove absence of negligence. The ultimate effect of this alteration of the burden

¹⁴³ Trucco 1981 *DePaul L Rev* 413; **Spidle v Steward** 79 Ill 2d 1 37 Ill Dec 326 402 NE2d 216 (1980).

of proof is to make medical practitioners insurers against bad results ¹⁴⁴.

4.13 THE PROCEDURAL EFFECT OF THE DOCTRINE

After the question of applicability of the doctrine of *res ipsa loquitur* has been addressed, either by establishing the requirements for the invocation of the doctrine as a matter of law or under a conditional *res ipsa loquitur* instruction by the jury, the question as to whether the plaintiff will prevail in a medical negligence case is dependent on the procedural effect afforded to its invocation ¹⁴⁵. There is even less unanimity amongst commentators to its procedural effect than to its application ¹⁴⁶.

The majority of jurisdictions support the view that the doctrine raises only a permissible inference of negligence. In terms of this approach the jury is permitted but not compelled to draw on inference of negligence from the circumstances ¹⁴⁷.

¹⁴⁴ Trucco 1981 *DePaul L Rev* 436; See also fn 61 **supra**.

¹⁴⁵ Prosser 1936 *Minn L Rev* 241 ff; Podell 1977 *Ins Council J* 644; De Lousanoff 51.

¹⁴⁶ De Lousanoff 51.

¹⁴⁷ In terms of this approach De Lousanoff 52 states that *res ipsa loquitur* is not considered a substantive rule of law but rather as a rule of evidence which permits the jury and not the court to infer negligence if the requirements of the doctrine are met.

The second approach entails the creation of a presumption which shifts the burden of going forward to the defendant. The effect of this approach is that it requires a directed verdict for the plaintiff unless the defendant introduces sufficient evidence to exculpate himself ¹⁴⁸.

The third view has the effect of not only creating a presumption but also shifts the burden of proof to the defendant who has to prove that he was in fact not negligent on a preponderance of the evidence ¹⁴⁹.

¹⁴⁸ De Lousanoff 54.

¹⁴⁹ Ibid 56ff. Podell 1977 *Ins Council J* 645 expresses the following opinion with regard to the different approaches: “The policy considerations supporting the two minority positions include the defendant’s greater access to the facts explaining the injury, the frequent unconsciousness of the plaintiff at the time of injury, the special relationship between physician and patient, and the alleged conspiracy of silence. These factors have given support to the view that it is more equitable and efficient to require the defendant to explain the injury than to require the plaintiff to prove that the injury resulted from negligence. While these policy considerations are persuasive, they may be sufficient to justify the application of *res ipsa loquitur* against multiple defendants in a medical malpractice action so as to enable the plaintiff to establish a *prima facie* case. Since the effect of the doctrine is commonly the same under either the inference or presumption view, the defendant will generally come forth with rebuttal evidence. The result satisfies the underlying goals of these basic policy considerations and sufficiently balances the inequities of proof in a medical malpractice case without deviating from traditional concepts of fault liability to shift the burden of proof to the defendant”. See also De Lousanoff 56ff.

4.14 THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL

According to Podell ¹⁵⁰ the evidence, including the inference of negligence will be weighed by the jury in circumstances where the defendant either offers no evidence in rebuttal or if the exculpatory evidence is less than equally probable than negligence. The evidence without the inference of negligence will be weighed by the jury as a factual question where the exculpatory evidence is equally probable with the inference of negligence.

The plaintiff is not required to reply to the evidence in rebuttal to reach the jury but if the exculpatory evidence is of such a nature that it establishes non-negligence conclusively the court will direct a verdict in the defendant's favour and thus withhold the case from the jury. In cases where the plaintiff's evidence is compelling the courts will under the inference approach, require the defendant to justify his actions to avoid a directed verdict. Where the plaintiff's evidence is of a conclusive nature so as to render the inference of negligence inescapable, the failure of the defendant

¹⁵⁰ Podell *supra* 645ff.

to establish exculpatory evidence will have the same effect as where a defendant under the presumption approach, fails to go forward with the evidence because in both instances the defendant runs the risk of a directed verdict if he fails to offer any evidence.

She further opines that the courts have generally strictly construed the requirements for the application of the doctrine to medical negligence cases thereby enforcing plaintiffs to approximate a compelling level to satisfy the conditions precedent. This factor together with the fact that defendants usually offer evidence in rebuttal as far as medical negligence cases are concerned, support the contention that the procedural force under either the inference- or presumption approach is more often than not, identical ¹⁵¹.

¹⁵¹ Podell 1977 *Ins Council Journal* 647. In summary she states as follows: "The effect of *res ipsa loquitur* in medical malpractice litigation does not guarantee the plaintiff a favourable verdict. Not only must the plaintiff satisfy strict threshold requirements in order to gain the benefit of the inference, but the inference so created can be overcome by the strength of the defendant's evidence or can be afforded whatever weight the jury chooses...These factors produce a result significantly distant from the popular notion that a plaintiff in a malpractice case need merely provide a showing of injury to recover under the doctrine".

4.15 OVERVIEW OF LEGAL OPINION

Due to the complete lack of unanimity among academic commentators on the applicability of the doctrine of *res ipsa loquitur* to medical negligence cases in the USA, it is difficult not to associate oneself with the following sentiments expressed by Adamson in this regard:

“Since *res ipsa loquitur* is incapable of accurate definition, and no one can say when it is or is not applicable, and few can agree as to its exact effect when applicable, it would be presumptuous to attempt to create order out of chaos within the confines of this brief Article. Perhaps the best solution to the problem would be to abolish the whole doctrine (whatever the doctrine may be) and start anew, free from layers of associations which the years have heaped upon *res ipsa loquitur*. But the law does not discard a hallowed and handy doctrine merely because learned writers and the courts cannot agree. Besides, every lawyer, while unable to write a definite treatise on the subject nevertheless *feels* that he has some kind of subjective grasp of the matter so that he knows when *res ipsa loquitur* should be applicable although he cannot say why”¹⁵².

Adamson points out that a dilemma which has always existed in tort law to marry the concept that all worthy suitors will be successful and that all blameless defendants will be completely protected, also exists in medical negligence litigation. He states that the application of the doctrine of *res ipsa loquitur* to medical negligence cases weighs the scales heavily in favour of

¹⁵² Adamson 1962 *Minn L Rev* 1043-1044.

the patient-plaintiff. Application of the doctrine, he says, is tantamount to imposition of liability without fault and in practice it means that the doctor must conclusively vindicate himself or suffer the consequences no matter how blameless he may be or how ‘impossible’ it may be for him to ‘explain’. The jury is also usually sympathetic to the patient and has the final say¹⁵³.

Rubsamen opines that the Supreme Court should make it clear that *res ipsa loquitur* is a doctrine of circumstantial evidence. The courts should be cautioned that where expert evidence gives rise to the doctrine, the strands of medical evidence must be separated and examined. Only where there is a statement that the nature of the injury infers negligence will the first requirement of *res ipsa loquitur* be met and this must be kept separate from the “standard of care” issue¹⁵⁴.

¹⁵³ Adamson 1962 *Minn L Rev* 1057.

¹⁵⁴ Rubsamen 1962 *Stan L Rev* 251 282. He opines that: “The most intangible aspect of the problem raised by *res ipsa loquitur* is possibly the most important. Few critical physicians would disagree on the underlying requirement for good medical practice – the doctor’s freedom to make choices with only medical considerations in mind. These choices are frequently difficult, and mistakes which do not constitute negligence may occasionally lead to serious disability or death...If the medical community develops the feeling that it is being subjected to unwarranted risks of legal liability, this harassment cannot help but interfere with medical decision making”.

He advocates the return of *res ipsa loquitur* to its original role of being an evidentiary device which is employed for the purpose of avoiding a nonsuit and permitting the jury to apply its common sense where common sense is called for. He states that “common-knowledge” *res ipsa* should be limited to situations which truly raise an inference of negligence for the layman. He concludes by saying that the increased interest of the medical profession to provide expert witness panels should alleviate the problem of raising expert *res ipsa loquitur* when appropriate ¹⁵⁵.

Trucco, in considering the conditional *res ipsa loquitur*, states that although the societal policy of compensating an injured patient is laudable, its foundation for assessing liability must rest on a reasonable basis in a system where liability is predicated on fault. He says that to hold a doctor liable for negligence without reference to inherent risks and probabilities of adverse results of complicated medical procedures, is the product of ‘an expedient judicial manipulation of *res ipsa loquitur* to achieve a desired result’. By allowing jury speculation on the issue of negligence without the safeguards embodied in the traditional doctrine, the distinction between liability based on fault and strict liability is to a great extent undermined ¹⁵⁶.

¹⁵⁵ Rubsamen 1962 *Stan L Rev* 283.

¹⁵⁶ Trucco 1981 *De Paul L Rev* 439.

Ablin is likewise of the opinion that courts might be using the doctrine not because of its inherent worth but as a means of transforming the tort regime from a fault based system to one of strict liability. She says that *res ipsa loquitur*'s true raison d'être may be its use as a formula for relaxing the earlier rigidity of the logical pursuit of fault at a time when the importance of fault itself has been waning.

Ablin further submits that not only does the Latin tag add nothing to the proof which would exist without it but also that there has been no case where it has been anything but a 'hindrance'. She concludes that the time has perhaps come to consign the Latin tag to the legal dustbin as it seems that courts are only using the doctrine to achieve a result without reference to the reasons for it or to its limitations¹⁵⁷.

On the other end of the scale commentators such as Harney opine that the doctrine of *res ipsa loquitur* is nowhere needed more than in the medical negligence action. He states that one of the most pervasive legal problems in cases of this nature is the issue of causation. Often the facts which reveal

¹⁵⁷ Ablin 1996 *Virginia L Rev* 355.

professional negligence will not be sufficient to establish the requisite legal cause. He submits that the practice of medicine is in itself the application of an inexact science and the proving of medical negligence causing untoward results, is by necessity also inexact. The application of the doctrine to such cases facilitates proof of that nature ¹⁵⁸.

De Lousanoff suggests that the courts should formulate special rules and criteria for medical negligence cases to induce them to turn away from the misuse and confusion-causing extension of the doctrine of *res ipsa loquitur*. He says that policy considerations such as the defendants greater access to the facts explaining the injury, the unconsciousness of the patient at the time of the injury, the special fiduciary relationship between the doctor and patient and the conspiracy of silence, which led to the extension of the doctrine, would fully justify an exception from the normal principles of the burden of proof in the 'foreign object', and 'unrelated injury' cases or in an action against multiple defendants. In this regard he states:

“The shift of the burden of proof to the defendant(s), without referring to *res ipsa loquitur* at all, would be a clear solution which, in view to the other existing exceptions to the general

¹⁵⁸ Harney 429-430.

principle that the burden of proof lies on the plaintiff, is by all means compatible with the traditional tort system based on fault liability. It would still mean a big step from there to strict liability or other compensation systems”¹⁵⁹.

Podell is of the opinion that there seems to be undue concern with regard to the use of *res ipsa loquitur* in medical negligence cases. According to her the requirements for the application of the doctrine have been strictly controlled by the courts. Despite the plaintiff's difficulties in obtaining expert evidence, the recognition that many medical matters do not fall beyond the knowledge of lay persons and the impossibility of proving specific acts of negligence because of the plaintiff's unconscious state when the injury occurs, the courts have still not been willing to apply the doctrine beyond limited factual settings.

The defendant usually stands in a superior position to account for the cause of harm during treatment and assumes a professional role which charges him with constructive knowledge of the full course of medical proceedings. The inference of negligence created by the application of the doctrine of *res ipsa loquitur* may easily be destroyed because the defendant-doctor has greater access to the actual facts as well as to medical experts for the purpose of

¹⁵⁹ De Lousanoff 58.

substantiating that the complications which arose did in fact ensue despite the exercise of due care. Should the evidence establish an equal probability of negligence or non-negligence the jury will consider the question without the inference and in this regard she says that the jury's perceived 'plaintiff favoritism', is a traditional notion which is no longer valid. In this regard Louisell and Williams state that in their experience, which includes interviews with experienced judges and counsel are indicative of the fact that a jury trial is now often thought to be more favourable to the defendant in the general run of negligence cases¹⁶⁰.

She also criticises the view that extended discovery procedures makes reliance on the doctrine unnecessary as these procedures are mainly designed to compel disclosure after the action is instituted and consequently a plaintiff may not have sufficient information to frame a complaint without the use of the doctrine. Compared to other areas of negligence litigation the use of expert testimony to establish the applicability of *res ipsa loquitur* is in keeping and consistent with modern trends where the threshold

¹⁶⁰ Louisell and Williams *Medical Malpractice* (1973) 453.

determination is outside the common knowledge standard. In this regard she also observes that the control element has been relaxed outside the area of medical negligence cases which provides for a more logical employment of the doctrine because modern professional responsibilities often substitute the right to control for actual control. She says that to impose liability on a medical practitioner who disclaims control or knowledge of what transpired while a patient is unconscious and who fails to establish proof of due care and skill, is consistent with the theories of vicarious liability under the universally accepted *respondeat superior*.

Another justification for the application for the doctrine of *res ipsa loquitur* is the special fiduciary relationship between the parties which demands that the doctor provides an explanation to the patient concerning the injury which occurred. She concludes by stating that the failure of the legislature to alleviate the plaintiff's difficulties in obtaining expert testimony provides additional justification for the continued application of the doctrine of *res ipsa loquitur* in medical negligence litigation ¹⁶¹.

¹⁶¹ Podell 1977 *Ins Council J* 645-649.

4.16 SYNOPSIS

4.16.1 INTRODUCTION

As in the case of the South African and English legal systems certain well-established principles with regard to the application of the doctrine of *res ipsa loquitur* in general context as well as to medical negligence cases in particular, have emerged with regard to the following issues:

- 1.1 the requirements for the application of the doctrine;**
- 1.2 the nature of the doctrine;**
- 1.3 the effect of the doctrine on the *onus* of proof;**
- 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:

4.16.2 THE REQUIREMENTS FOR APPLICATION OF THE DOCTRINE

4.16.3 NEGLIGENCE

1. The accident must be one which in the light of the ordinary experience

of the layman invites an inference that as a matter of common knowledge the defendant has been negligent ¹⁶².

2. The evidence required in order for the doctrine to be invoked must be such that reasonable persons can say that it is more likely that there was negligence associated with the cause of the accident than that there was not ¹⁶³.
3. In medical context two rules effect the common knowledge requirement namely the 'calculated risk' and the 'bad result' rule, respectively ¹⁶⁴.
4. The 'common knowledge' requirement has been liberalised to the extent that there is a growing recognition that certain sophisticated medical matters fall within the common knowledge of laypersons. Some courts allow the plaintiff to both introduce evidence of specific acts of negligence and to rely on the doctrine of *res ipsa*

¹⁶² **Seneris v Haas supra 915; Frost v Des Moines Still College of Osteotomy and Surgery supra 306; Fehrman v Smirl supra 255.**

¹⁶³ **Marathon Oil v Sterner Tex supra 571; Markanian v Pagano supra 335; Smith v Little supra 907.**

¹⁶⁴ In terms of the 'calculated risk' rule the doctrine is not applied where the defendant can produce expert evidence or statistics showing that the accepted method of treatment he employed, involved substantial or material risks to the patient. The 'bad results' rule involves the principle that evidence of a bad result, without expert medical evidence, does not on its own constitute sufficient evidence to draw an inference of negligence. (**Engeling v Carlson supra 695; Farber v Olkon supra 525; Olson v Weitz supra 537; Robinson v Wirts supra 706; Rhodes v De Haan supra 1043; Terhune v Margaret Maternity Hosp supra 75**).

loquitur. In this regard the doctrine is liberalised to the extent that the plaintiff is in some jurisdictions permitted to rely on the doctrine and present expert medical testimony with regard to both negligence and opine whether the type of accident was one which would ordinarily not occur in the absence of negligence ¹⁶⁵.

5. Courts have also allowed the plaintiff not just to allow 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 ¹⁶⁶.

4.16.4 CONTROL

1. The accident must be caused by an agency or instrumentality within the exclusive control of the defendant ¹⁶⁷.

¹⁶⁵ **Seneris v Haas supra 915; Mayor v Dowsett supra 234; Harris v Cafritz Memorial Hospital supra 135; Perin v Hayne supra 609; Walker v Rumer supra 689; Bucklelew v Grossbard supra 1115; Parks v Perry supra 287.**

¹⁶⁶ Ablin 1996 *Ins Council J* 335.

¹⁶⁷ **Bjornson v Saccone supra 88.**

2. Some courts 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 in the absence of negligence, and that the negligence which caused the event was probably that of the defendant ¹⁶⁸.
3. Although the majority of jurisdictions support the view that the doctrine of *res ipsa loquitur* does not find application to multiple defendants ¹⁶⁹ courts have applied the doctrine to multiple medical defendants who had concurrently exercised control over medical instrumentalities ¹⁷⁰.

4.16.5 CONTRIBUTORY NEGLIGENCE ON THE PART OF THE PLAINTIFF

¹⁶⁸ **Payless Discount Centers Inc v North Broadway Corp supra 22; Parillo v Giroux Co Inc supra 1313.**

¹⁶⁹ **Turner v North American Van Lines supra 384; Beakley v Houston Oil & Minerals Corp supra 396; Fireman's Fund American Insurance Companies v Knobbe supra 825.**

¹⁷⁰ **Ybarra v Spanguard supra 687; Oldis v La Societe Francaise de Bienfaisance Mutuelle supra 184; Sherman v Hartman supra 894; Frost v Des Moines Still College of Osteopathy and Surgery supra 306; Voss v Bridwell supra 955; Matlick v Long Island Jewish Hospital supra 631; Fogal v Gensee Hospital supra 552; Shields v King supra 922; Anderson v Somberg supra 366; Somerset v Hart supra 814; Kowalski v Voirs supra 397; Jones v Harrisburg Polyclinic Hospital supra 1134; Swan v Tygett supra 590; Schaffner v Cumberland County Hospital System Inc supra 579; Butti v Rollins supra 14.**

1. There must be an absence of any act on the part of the plaintiff which contributes to the occurrence in order that the plaintiff does not recover damages for injuries for which he himself is responsible ¹⁷¹.
2. Where in medical context, the court finds that the plaintiff behaved in such a manner as to contribute to his own injury the doctrine of *res ipsa loquitur* is not applied against the parties who administered the treatment ¹⁷².
3. The advent of comparative fault acts converts the plaintiff's contributory fault from the traditional barring of liability to one of reducing damages to the *pro rata* degree of fault of the plaintiff ¹⁷³.

4.16.6 EVIDENCE MUST BE MORE ACCESSIBLE TO THE DEFENDANT

1. This requirement cannot be regarded as indispensable and the underlying reason for it may be to give the doctrine a greater

¹⁷¹ **Dugas v Coca-Cola Bottling Co supra 1054; Brantley v Stewart Building & Hardware Supplies Inc supra 943; Emerick v Raleigh Hills Hospital - Newport Beach supra 92; Watzig v Tobin supra 651.**

¹⁷² **Hornbeck v Homeopathic Hospital Asso supra 461; Kitto v Gilbert supra 544; Mayor v Dowsett supra 234; Holmes v Gamble supra 905; Emerick v Raleigh Hills Hospital - Newport Beach supra 92.**

¹⁷³ See fn 18 supra 178.

procedural effect. It has found limited application in medical context
174 .

4.17 THE NATURE OF THE DOCTRINE

Unless there are special circumstances applicable or a special relationship between the plaintiff and the defendant, the majority of courts in the USA regard the doctrine of *res ipsa loquitur* as a form of circumstantial evidence which permits but does not compel an inference of negligence against the defendant¹⁷⁵.

4.18 ONUS OF PROOF

1. There are three divergent approaches which the courts have adopted in the USA with regard to the procedural effect of the doctrine on the *onus* of proof.
2. In terms of the first approach the jury is permitted but not compelled to infer negligence from the plaintiff's case and has the effect of

¹⁷⁴ **Bucklelew v Grossbard supra 1157; Strick v Strutsman supra 148; Holman v Reliance Insurance Companies supra 1298; Faby v Air France supra 1018; Seneris v Haas supra 915.**

¹⁷⁵ **Sweeny v Erving supra 815; National Tea Co v Gaylord Discount Department Stores Inc supra 345; Watzig v Tobin supra 651.**

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 adoption of this approach has the effect that the burden of proof does not shift to the defendant nor an obligation to move forward with the evidence, except in the limited sense that if the defendant fails to tender any evidence he runs the risk that the jury may find against him. The strength of the inference to be drawn will as a general proposition depend on the specific circumstances of the case ¹⁷⁶.

2. 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, also entitling 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 tender evidence of a greater weight than the plaintiff. If the scales are evenly balanced when all the evidence is in, the verdict must be for the defendant ¹⁷⁷.

¹⁷⁶ **Buckelew v Grossbard supra 1157; Wilson v United States supra 728; Thomkins v Northwestern Union Trust Co supra 402; Rathvon v Pacific Airlines supra 122; Estate of Neal v Friendship Manor Nursing Home supra 594; Watzig v Tobin supra 651.**

¹⁷⁷ **Newing v Cheatham supra 33; Hyder v Weilbaecher supra 426; Hammond v Scot Lad Foods Inc supra 362.**

3. In terms of the third approach the *onus* of proof is shifted to the defendant who is required to prove on the preponderance of the evidence that the injury was not suffered as a result of his negligence¹⁷⁸.
4. Where a defendant is able to introduce some evidence which tends to show specific acts of negligence on the part of the defendant but does not provide a full and complete explanation of the occurrence it does not destroy the inferences which are consistent with the evidence and consequently does not deprive the plaintiff of the benefit of *res ipsa loquitur*¹⁷⁹.
5. Some jurisdictions permit a so-called conditional *res ipsa loquitur* in circumstances where it is problematic to establish whether the doctrinal requirements have been met and where ‘reasonable minds’ may differ on the issue. In such circumstances the jury is instructed to determine whether the facts justify the application of the doctrine to the case and if the jurors’ conclusion is in the affirmative they are then instructed as to the procedural effect of the application of the doctrine¹⁸⁰.

¹⁷⁸ **Weiss v Axler supra 88; Johnson v Coca–Cola Bottling Co supra 537; Homes v Gamble supra 905; Toussant v Guice supra 850.**

¹⁷⁹ **Mobil Chemical Co v Bell supra 245; Kranda v Houser-Norborg Medical Corp supra 1024.**

¹⁸⁰ **Seneris v Haas supra 915; Quintal v Laurel Grove Hosp supra 161; Tomei v Henning supra 633; Clark v Gibbons supra 125; Schnear v Boldrey supra 478.**

4.19 THE NATURE OF THE DEFENDANT'S EVIDENCE IN REBUTTAL

1. With the exception of a minority of jurisdictions it is generally accepted that the invocation of the doctrine does not cast the burden of proof on the defendant and on this basis the defendant is not obliged to tender any evidence and if he does, it need only permit the jury to say that it is as probable that he was not negligent than that he was ¹⁸¹.
2. The inference of negligence must be balanced against the defendant's evidence and the jury is not obliged to draw the inference which only has weight while reasonable persons are able to derive it from facts in evidence ¹⁸².
3. The defendant must tender evidence which will neutralize any reasonable inference of negligence or contradict it to such an extent that reasonable persons can no longer accept it, in order to get a directed verdict in his favour. The nature of the defendant's evidence to neutralize the 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

¹⁸¹ **Volnault v O'Rourke supra 535; Micek v Weaver-Jackson Co supra 768; Nopson v Wockner supra 1022.**

¹⁸² **Prooth v Wallsh supra 666.**

no control, 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 ¹⁸³.

4. 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 ¹⁸⁴.

4.20 STATUTORY REGULATION OF THE DOCTRINE

1. State legislatures have the authority to regulate the application of the doctrine. A number of these statutes limit or have abolished the doctrine in medical negligence cases ¹⁸⁵.

¹⁸³ **Oliver v Union Transfer Co supra 478; Lopes v Narragansett Electric Co supra 55; Wagner v Coca-Cola Bottling Co supra 807; American Village Corp v Springfield Lumber and Building Supply supra 891; Town of Reasnor v Pyland Construction Co supra 269; Strick v Stutsman supra 184.**

¹⁸⁴ **Prooth v Wallsh supra 666.**

¹⁸⁵ See fn 65-67.

4.21 CONCLUSION

Case law suggests that the doctrine of *res ipsa loquitur* is applied to a wide variety of circumstances in medical context. The development of the doctrine in this field has been controversial and commentators argue that its application has not facilitated a more precise judgment but rather has led to legal uncertainties.

While the medical profession advocates the barring of the application of the doctrine to medical negligence cases completely and while a too liberal application of the doctrine may make such a view logically defensible and practically warranted, it is submitted that doctors should be treated like any other litigants, no better and no worse.

Extended discovery procedures, a growing willingness of the medical profession to provide expert medical opinion in medical negligence cases and a jury's perceived plaintiff favouritism are some policy considerations which do not outweigh the need to apply the doctrine in limited but meritorious medical negligence cases. It is important however that the

doctrine should be applied evenly and consistently so as to ensure that liability is not imposed in an arbitrary way.

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 ¹. 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

¹ 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 ².

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 ³. It is submitted that the plaintiff would similarly be permitted to rely on the doctrine of *res ipsa loquitur* under such circumstances.

² **Burger v Santam 1981 2 SA 703 (A).**

³ 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 ⁴ the nature of the doctrine is regarded as a

⁴ 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**⁵ 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

⁵ 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**⁶ 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

⁶ 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.

CHAPTER 6

***DE LEGE FERENDA* RECOMMENDATIONS WITH REGARD TO THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR* TO MEDICAL NEGLIGENCE AND RELATED MEDICAL MALPRACTICE ISSUES IN SOUTH AFRICA**

6.1 INTRODUCTION

In advocating and supporting the approach that the doctrine of *res ipsa loquitur* should be applied to certain limited but meritorious medical negligence actions in South Africa, it is important to note that the prime bases on which reliance should be placed in support of such an approach, are not so much represented by principles such as equality, fairness and related policy and constitutional considerations, but rather the fact that its application is presently barred by the majority judgment in **Van Wyk v Lewis**. In this regard it should be borne in mind that the South African courts have, for more than a century been applying the doctrine of *res ipsa loquitur* to various other delictual claims, where the requirements for the application of the doctrine have been adhered to.

South African courts have only declined to apply the doctrine to medical negligence cases because it has been argued, accepted and held that in medical context, the requirement that the occurrence must fall within the scope of the ordinary knowledge and experience of the reasonable man, cannot be met. This notion is the brainchild of the majority judgment in **Van Wyk** and until this 1924 judgment is successfully challenged and overturned, lower courts are bound to follow this approach because of the *stare decisis* legal precedent system which is adhered to in South Africa. Based on the expert evidence which was led at the trial, it is submitted that there are reasonable grounds for advancing a persuasive argument that this judgment should in fact be overruled. Although support for applying the doctrine to medical negligence actions can also be found with reference to constitutional and other considerations it is endeavoured here to primarily focus on the judgment in **Van Wyk**.

Should the judgment in **Van Wyk** be overruled, there also seems to be no compelling reason not to apply the doctrine to related medical malpractice issues such as medical inquests, criminal prosecutions arising from medical negligence and disciplinary inquiries instituted by the Health Professions Council of South Africa relating to unprofessional conduct by its members.

6.2 WHY SHOULD VAN WYK BE OVERRULED?

6.2.1 THE COURT'S MISDIRECTIONS RELATING TO THE EXPERT MEDICAL EVIDENCE

The general impression created by several prominent medical experts who either testified at the trial or tendered evidence on commission, was that despite the fact that there were systems in place to prevent the post operative retention of surgical products, swabs were still being left behind in the bodies of patients by careful and skilful surgeons, not because it was dangerous to search for these swabs intra-operatively, but because of a failure of such systems and human error. The evidence was furthermore indicative of the fact that it was as dangerous to leave behind a swab in the patient than to search for it intra-operatively. If an operation had to be terminated because of the patient's critical condition before a missing swab was found, the surgeon would have had to re-open the patient and remove the swab as soon as the patient was able to sustain such a further surgical intervention.

In *casu* the evidence of Dr Lewis was that he had never been made aware that a swab had been retained. It also appears that he sought to further exculpate himself by *inter alia* testifying that it was a difficult operation, where time was of the essence and it was in the patient's interest to be stitched up and removed from the operating table as soon as possible. His defence was not conducted on the basis that he had to terminate the operation before finding the missing swab because of the plaintiff's critical condition. The *gravamen* of his case was the fact that he was not even aware that there was a swab missing and if there was, he averred that it was the responsibility of the theatre sister employed by the hospital and for whom he was not vicariously liable ¹.

A balanced, objective consideration and evaluation of the evidence should have led the court to conclude that the fact that the swab was post-operatively retained by the patient established a *prima facie* case of negligence ². The defendant was able to escape liability by tendering acceptable exculpatory evidence. The facts of the case, moreover, provide a valuable example of circumstances where the plaintiff should have been

¹ Both in the pleadings and at the trial it was denied that a swab was retained.

² Correctly acknowledged in the minority judgement by Kotze J.

permitted to rely on the doctrine after proving only, that the swab was post-operatively retained. This *prima facie* inference of negligence (ie the retention of the swab) would merely have required from Dr Lewis to provide an exculpatory explanation of why it had been retained. In this regard he was able to establish that he was not aware that a swab was missing and in any event the responsibility of counting the swabs and informing the surgeon, if any, were missing was apparently that of the theatre sister, who was employed by the hospital and for whose actions he was not responsible. It is submitted that the evidence relating to the fact that the patient's condition was too critical to search for the missing swab, was tendered on the hypothetical assumption that Dr Lewis was in fact aware that a swab was missing. Evidence relating to this issue can therefore only be regarded as speculative and the court could easily have disregarded such evidence completely in order to adjudicate the *lis* between the parties. Even if the defendant relied on this defence exclusively, his evidence is clear that the plaintiff would have had to be re-opened surgically as soon as possible thereafter in order to detect and remove the missing swab³.

The Appeal Court based its holding (that *res ipsa loquitur* could not find

³ In which case there would have been no question of negligence on his part.

application in this case) on the fact that the court would in view of the notion that the medical layman knows very little, if anything, of complicated abdominal surgery have had to also consider the surrounding circumstances provided by expert medical opinion. It is submitted that the court made two fundamental errors in this regard: Firstly, the occurrence (ie the post-operative retention of the swab) clearly bespoke negligence, even from the medical layman's point of view. It cannot be argued with any confidence that the court would have had to consider expert medical evidence to be persuaded that the swab should not have been left behind in the patient's body. It appears that the court only considered the 'surrounding circumstances' at the stage when the defendant provided his exculpatory evidence. Unfortunately the majority of the court compounded this material misdirection by elevating a speculative defence to accentuate the complexities of abdominal surgery, which had the effect of placing the 'occurrence' outside the realm of the ordinary experience and common knowledge of the medical layman.

As indicated above the court moreover also misconstrued the expert evidence by accepting that swabs are often left behind in patients' bodies if a

life threatening intra-operative situation develops. By disregarding the further evidence that such a swab cannot be left in the patient and has to be removed as soon as the patient is up to a further operation, the completely wrong impression was created and unfortunately still subsists.

6.2.2 THE COURT'S ERRONEOUS REASONING AS TO THE STAGE AT WHICH IT SHOULD CONSIDER WHETHER THE REQUIREMENTS FOR THE APPLICATION OF THE DOCTRINE HAVE BEEN MET

It is clear from the judgment that the court formed its holding that the doctrine could not find application to medical negligence cases, only after considering the evidence of the defendant. By having regard to the evidence that a surgeon in a complicated abdominal operation sometimes has to terminate the operation before searching for a missing swab, in order to save the patient's life, it seems as if the court deducted that the leaving of a swab in the body of a patient does not necessarily imply negligence and an investigation of the surrounding circumstances is required before the issue as to the possible negligence of the defendant can be decided. It is respectfully submitted that this approach by the court conflates a question of law (ie

whether an inference of negligence can be drawn from the occurrence itself) and a question of fact (ie whether the facts, including the evidence of the defendant, or absence of such evidence support the inference of negligence).

It cannot seriously be contended that the leaving behind of a surgical instrument in the body of a patient after the completion of an operation does not create a *prima facie* inference of negligence (which does not require the court to have regard to any surrounding circumstances). Viewed in this context, Mrs van Wyk adhered to the requirements for the application of the doctrine (at the stage of closing her case) because she had established the facts (proof of the retention of the swab in her body) upon which an inference of negligence (which is a question of law), may be drawn. The courts approach of having regard to the defendant's explanation in order to decide whether the inference of negligence is derived from an 'absolute' and not something 'relative', is with respect, a fundamental misdirection. To illustrate the court's erroneous reasoning in this regard, the example of a motorvehicle skidding onto its incorrect side of the road provides an appropriate comparison by way of analogy.

South African courts accept that evidence of the skidding of a motorvehicle onto its incorrect side of the road, establishes a *prima facie* inference of

negligence on the part of the driver of that vehicle and the doctrine could therefore legitimately be applied to these circumstances. If the defendant, for example, tenders expert evidence to the effect that the skid was caused as direct result of a malfunction of the motorvehicle's 'ABS braking system' (the mechanical and engineering details and operation of such an advanced braking system cannot possibly fall within the common knowledge and ordinary experience of the reasonable man) this explanation should be sufficient to exculpate him. If the **Van Wyk** court's reasoning is applied to this example, the court would find that the doctrine cannot be applied to accidents of this nature because the layman knows very little, if anything, about the complicated workings of an advanced braking system of a modern motorvehicle.

The logical conclusion of this form of erroneous reasoning is that the doctrine cannot be applied to any accident where the exculpatory explanation tendered by the defendant, involves matters of a technical or complicated nature which ordinarily falls outside the scope and experience of the reasonable man. This approach is clearly wrong and provides another compelling reason for this judgment to be overruled.

6.3 OTHER CONSIDERATIONS WHICH SUPPORT THE APPLICATION OF THE DOCTRINE TO MEDICAL NEGLIGENCE CASES

6.3.1 THE CONSTITUTIONAL PRINCIPLES OF EQUALITY AND THE RIGHT TO A FAIR TRIAL

In terms of Section 9 of the **Constitution of the Republic of South Africa Act**⁴ everyone is equal before the law and has the right to equal protection and benefit of the law. In this regard it could be argued that the victim of a medical accident is at a procedural disadvantage because of the fact that a patient is usually anaesthetised or under the influence of an anaesthetic agent when the accident occurs, as a result of which, he or she is completely in the dark as to what actually happened. To permit the plaintiff under these circumstances, to rely on *res ipsa loquitur* would level the playing fields between the plaintiff and the defendant to a certain extent by promoting procedural equality. Section 34 of **Act 108 of 1996 (as amended)** also recognises the right to fairness in civil litigation which provides further constitutional motivation for the application of the doctrine to medical negligence actions.

⁴ **Sec 9(1) Act 108 of 1996 (as amended)**. See also Carstens 1999 *De Jure* 26.

During March 2001 the **Promotion of Access to Information Act**⁵ came into force. In terms of section 50 of this Act a patient is now entitled to request access to his medical records provided that such access is required for the exercise or protection of any rights, that the procedural requirements of the act is adhered to and that the access is not refused in terms of any ground for refusal as specified in the Act. The promulgation of this Act can be regarded as one of the most significant breakthroughs with regard to medical accidents from the patient's perspective. A patient was previously only entitled to inspect such records after legal proceedings had been instituted in terms of the practices of discovery of documents provided by the rules of the lower and higher courts⁶. The fact that a patient is able to inspect his medical records prior to litigation will now enable his legal representatives to investigate the merits of a possible medical negligence claim with much more precision and may even lead to a reduction of malpractice claims because accurate medical record keeping with regard to the medical intervention under investigation will usually reflect the circumstances under which the medical accident occurred and if there is little prospect of success an action will be ill-advised.

⁵ **Act 2 of 2000.**

⁶ Rule 35 of the High Court Rules and Rule 23 of the Magistrate's Court Rules.

6.3.2 POLICY CONSIDERATIONS

Policy considerations supporting the application of the doctrine of *res ipsa loquitur* to medical negligence cases include the defendant's greater access to the facts explaining the injury, the plaintiff's frequent unconscious or anaesthetised state at the time of the injury, the special fiduciary relationship between the medical practitioner and the patient as well as the perceived 'conspiracy of silence' and reluctance to provide expert medical testimony amongst medical practitioners. These considerations support the view that it is more just and equitable to require from the defendant to provide an explanation as to what exactly happened than to require the plaintiff to prove specific acts of negligence under circumstances where he is usually not in a position to do so ⁷.

6.3.3 MODERN APPROACHES IN OTHER LEGAL SYSTEMS

It is clear from the comparative survey between South Africa, England and the United States of America that the approach of the South African courts with regard to the application of the doctrine of *res ipsa loquitur* to medical

⁷ See supra 158.

negligence actions is out of touch with modern trends in this regard. The more patient-orientated approach initiated in **Castell v De Greef**⁸ is in line with developments in other legal systems with regard to Health Care Law in general, and creates an environment where further traditional and outdated approaches such as the approach adopted in **Van Wyk v Lewis** can be successfully challenged. The emphasis which is placed on patient-orientated informed consent as well as advanced information technology furthermore have the effect of placing certain aspects of medical science within the common knowledge and ordinary experience of the reasonable man which in turn expands the parameters of the possible application of the doctrine to medical negligence cases.

6.4 DE LEGE FERENDA RECOMMENDATIONS WITH REGARD TO THE APPLICATION OF THE DOCTRINE TO SPECIFIC MEDICAL MALPRACTICE PROCEDURES IN SOUTH AFRICA

6.4.1 CIVIL MEDICAL NEGLIGENCE CASES

Despite the fact that a plaintiff, by using the provisions of the **Promotion of**

⁸ **supra 408**. The Supreme Court of Canada has however abolished the doctrine completely.

Access to Information Act, is now able to obtain copies of all medical records pertaining to his treatment before formulating his claim, it is submitted that the application of the doctrine of *res ipsa loquitur* could still play an important role in medical negligence cases. In this regard it must be borne in mind that medical records are not always accurate especially those records which relate to a medical emergency, where different role players each contribute to the treatment and the records are usually completed after the event. These records may be incomplete or certain vital information may not have been recorded. There is also the possibility that records may be tampered with or amended to the defendant's advantage, before copies are made available ⁹.

In South Africa the principle that the plaintiff cannot rely on the doctrine if the facts are known is well-established and understandable ¹⁰. There seems to be no reason, however, why a plaintiff should not be allowed to rely on the doctrine in the alternative. The main reason for applying the doctrine, is to assist the plaintiff to at least establish a *prima facie* case in circumstances

⁹ See for example **Michael v Linksfield Park Clinic (Pty) Ltd 2001 3 SA 1188 (SCA)** where the second defendant deviously contrived a false and misleading operation record which attracted an adverse costs order.

¹⁰ **Groenewald v Conradie supra 187.**

where the occurrence proclaims negligence but where the true facts are unknown to the plaintiff. It is submitted that the policy considerations referred to supra, support the approach that a medical defendant should at least be required to explain how the accident happened when he is in a position to do so. The fact that there is no shifting of the *onus* to the defendant provides adequate protection to the defendant from an evidential point of view.

In practice so-called blatant medical blunders such as the erroneous amputation of a healthy limb or injury to a healthy part of the body remote from the operation site, seldom if ever goes to court on the merits and the plaintiff will usually also be in a position to plead specific acts of negligence. While this may be the practical position there appears to be no reason in theory why a plaintiff should not be able to rely on the doctrine should he choose to do so or perhaps rely on the doctrine in the alternative.

In more complicated actions the English '**Ratcliffe model**' commends itself for acceptance. It is submitted that a plaintiff should both be permitted to prove the necessary facts relating to the accident from which the inference of negligence may be drawn and tender expert medical evidence to the effect

that this type of accident should nor occur if due care has been exercised. In this regard it is reiterated that the doctrine merely assists the plaintiff to establish a *prima facie* case. In medical negligence cases that is seldom where the evidential problems for the plaintiff cease but it's application should at least require the defendant to explain the accident and allow the plaintiff to test this version by way of cross-examination. It is often extremely difficult, in any event, to prove that all the consequences from which the plaintiff suffers were occasioned by the accident. Where, for example a malignant tumour is misdiagnosed it is often impossible for the plaintiff to prove on a balance of probabilities that a correct diagnosis at the time would have significantly influenced the outcome or the final prognosis.

The existing approach of the South African courts with regard to the procedural effect of the doctrine on the *onus* of proof and the nature of the defendant's explanation in rebuttal is acceptable. If the defendant elects not to give evidence the court can still rule in his favour despite the fact that the plaintiff has established a *prima facie* case by applying the doctrine. In this regard it is submitted, however, that if there is evidence that the defendant is in a position to explain the accident but elects to close his case without

leading such evidence, the court should draw a negative inference from such election which, together with the inference of negligence derived from the application of the doctrine, should be able to elevate the *prima facie* case of the plaintiff to conclusive proof status.

6.4.2 MEDICAL INQUESTS

In terms of Section 16(2) of the **Inquests Act** the judicial officer holding an inquest is charged to record a finding as to the identity of the deceased, the cause or likely cause of death, the date of death and as to whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person ¹¹.

The laws governing criminal trials are to be applied to certain procedures of the Inquest Court ¹² and as will appear from a discussion of the application of the doctrine of *res ipsa loquitur* to criminal prosecutions, *infra*, it would

¹¹ The Inquests Act, Act 58 of 1959 (as amended).

¹² Section 8. See also: Strauss 436-438; Carstens “*Die Strafregtelike en Deliktuele Aanspreeklikheid van die Geneesheer op grond van Nalatigheid*” 1996 (unpublished doctoral thesis UP) 313-318.

appear that the doctrine can be applied in such prosecutions and hence could also find application to a judicial inquest on that basis. The facts of a recent unreported medical inquest held in the Bellville magistrate's court, provides an interesting example of where the doctrine could have found application in a medical inquest ¹³.

On 19 February 1997 the deceased (who was suffering from leukaemia at the time) received two chemotherapeutic agents intrathecally from a doctor at the Tygerberg Hospital. One of the chemotherapeutic agents (Vincristine) which was administered intrathecally should have been administered intravenously. After re-admission to the Hospital's ICU unit for observation, the deceased displayed signs of ascending *polyneuropathy*. His condition continuously deteriorated and eventually on the 7 March 1997 adrenalin infusion was discontinued and he was extubated. At 13h02 the deceased was asystolic with no detectable bloodpressure. According to expert medical evidence at the inquest inadvertent intrathecal administration of Vincristine

¹³ **In re C Goldie GDO 154/99** (unreported).

is not only considered life-threatening but usually fatal. The doctor testified that she misunderstood telephonic instructions from a colleague and because she did not have previous experience in administering the drug, the accident occurred.

One of the other possibilities with regard to the possible cause of death considered at the inquest was that of the deceased suffering a neurotoxic fatal reaction to the intrathecal administration of the other drug Methotrexate which was administered at the same time. At *post mortem*, the cause of death was described by the neuropathologist as a toxic/metabolic etiology originating in the CSF. Some of the expert medical evidence was further to the effect that it could not be said with certainty whether the injury was caused by the Vincristine or a possible neurotoxic reaction to the Methotrexate. Legal representatives of some of the interested parties argued that the court could not establish the cause of death on this basis and if the cause of death was unknown at *post mortem*, nobody could be held accountable for the deceased' death.

If the Inquest Court applied the doctrine of *res ipsa loquitur* to the facts of this case, the facts giving rise to the inference of negligence would simply have been the inadvertent intrathecal administration of the Vincristine. Such evidence would have pointed to *prima facie* negligence by the doctor who administered the agent and would also have established a *prima facie* cause of death. The doctor would have had to furnish an exculpatory explanation. If it was found that the misunderstanding between the doctors, although unfortunate, could not exculpate the doctor who administered the drug, the explanation relating to another plausible non-negligent cause of death ie the possible neuro-toxic fatal reaction would then have had to be weighed with all the other evidence.

In this inquest the court rejected the possible neurotoxic reaction to the Methotrexate as a probable cause of death and also found that the deceased' death was brought about by the inadvertent intrathecal administration of the Vincristine which *prima facie* amounted to an offence by the doctor. It appears that the doctrine could be successfully utilized to assist an Inquest Court to record its findings, as the above example clearly illustrates ¹⁴.

¹⁴ Although the law which applies to criminal proceedings is made applicable to certain specified matters by section 8, Inquests are not regarded as criminal prosecutions as such. See **Wessels v Additional Magistrate Johannesburg 1983 1 SA 530 (T)**.

6.4.3 CRIMINAL PROSECUTIONS

The courts in South Africa have applied the doctrine of *res ipsa loquitur* in criminal prosecutions in general and similarly there seems to be no compelling reason not to apply the doctrine to criminal proceedings which follow a medical accident, in particular.

The important difference between civil and criminal proceedings in this regard is the standard of proof to be applied at the end of the case when the court considers all the evidence. The standard of proof ‘beyond reasonable doubt’ will obviously require more proof for a conviction to stand compared to the ‘balance of probabilities’ standard which is applicable to civil actions

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¹⁵ See *S v Mudoti supra 278*; *S v Maqashalala 1992 1 SACR 620 (Tk)*.

6.4.4 DISCIPLINARY INQUIRIES INSTITUTED BY THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

The disciplinary committee of the Health Professions Council of South Africa is a creature of statute and is not a court of law but a professional body acting in a quasi-judicial capacity ¹⁶. The conduct of disciplinary inquiries held in terms of the Act are governed by regulations.

With regard to procedure and evidence it has been held that bodies such as the disciplinary committee should be held more strictly to the rules of procedure practiced by a court of law. The extent to which such adherence is required will be influenced by the circumstances of the case, the subject matter of the inquiry, and particularly the rule of procedure or evidence which is sought to be applied, the principle being, that the less technical that rule of procedure and evidence is, the more likely the tribunal will be held bound by it ¹⁷.

¹⁶ The Health Professions Council acts in accordance with the regulations promulgated under **Section 61(1)(h)**, read with **Section 61(4)** of the Health Professions Act, 1974 (Act 56 of 1974) as amended. Government Notice No 22584 24 August 2001.

¹⁷ **De La Rouviere v SA Medical and Dental Council 1977 1 SA 85 (NPD)**. See also: **South African Medical and Dental Council v McLoughlin 1948 2 SA 355 (A) 410**; **South African Medical and Dental Council v Lipron 1949 3 SA 277 (A)**.

There seems to be no reason in principle why the *pro forma* prosecutor in such an inquiry should not be permitted to rely on the doctrine, particularly where the subject of the charge relates to medical negligence causing injury. In this regard it should be born in mind that the medical practitioner is usually insured and legally represented by experienced lawyers who would be familiar with the doctrine and who would ensure that their clients' rights are protected in this regard. A recent disciplinary inquiry provides an interesting example of an instance where the application of the doctrine would probably have assisted the complainant to a certain extent ¹⁸. The *pro forma* charge sheet read as follows:

“...THAT you are guilty of improper or disgraceful conduct or conduct which when regard is had to your profession is improper or disgraceful in that on or about...and in respect of Mr E (‘your patient’) you performed a laparoscopic cholecystectomy (‘the operation’) whilst you failed to take adequate precautions and/or failed to exercise due care in light of adhesions in your patient’s abdomen and thereby caused damage to your patient’s small bowel”.

¹⁸ MP 0-24570-4/313/97.

The legal representative acting for the surgeon successfully objected to the leading of any evidence relating to the post-operative course and treatment afforded to the complainant because of the restrictive manner in which the charge had been formulated. Should such evidence have been indicative of culpable substandard care, the accused may have been convicted. It is submitted that if the doctrine of *res ipsa loquitur* would have been applied to the circumstances of this inquiry, the accused would certainly have had to deal with the whole of the treatment (including the post-operative treatment) of the complainant in order to satisfy the requirements which are applicable to an exculpatory explanation in rebuttal. In this instance the accused was acquitted as the intra operative intervention was not regarded by the board as sub-standard or indeed negligent¹⁹.

6.5 PLEADING *RES IPSA LOQUITUR* IN MEDICAL NEGLIGENCE CASES

¹⁹ See also in general: Taitz “*The Disciplinary Powers of the South African Medical and Dental Council*” 1988 *Acta Juridica* 40; Strauss 369 376; Carstens 1996 (unpublished doctoral thesis UP) 318ff; **Nel v Suid-Afrikaanse Geneeskundige en Tandheelkundige Raad 1996 4 SA 1120 (T)**.

6.5.1 GENERAL

A pleading, in general, can be considered as a document which sets out the facts upon which the legal relief a party claims, is based ²⁰. The object of a pleading is to state the facts clearly and concisely upon which a party relies so that the other party can come to court prepared to meet that case and also to enable the court to identify the issue or issues it is to adjudicate upon ²¹.

With regard to conclusions, opinions or inferences, the facts giving rise to for example, an inference, must be pleaded. It is submitted that the facts which a party relies on to establish a basis upon which the doctrine of *res ipsa loquitur* can be invoked must be pleaded and set out in the plaintiff's particulars of claim.

²⁰ Harms *Civil Procedure in the Supreme Court* (2001) 236. See also in general: **Trope v South African Reserve Bank 1993 3 SA 264 (A)**; **Jowell v Bramwell-Jones 1998 1 SA 836 (W)**; Supreme Court Rule 18(4).

²¹ **Du Plessis v Nel 1952 1 SA 513**; **Ferreira v SAPDC (Trading) Ltd 1983 1 SA 235 (A)**.

6.5.2 *RES IPSA LOQUITUR*

It appears as if a plaintiff who is able to plead specific acts of negligence is not permitted to rely on the doctrine at all ²². As discussed supra, however, there seems to be no reason why a plaintiff should not be able to rely on the doctrine in the alternative.

In **Madyosi v SA Eagle Insurance Co Ltd** the plaintiff alleged facts which are *res ipsa loquitur* but went on to particularise the cause. Comrie J referred to the judgment of Greenberg J in **Naude NO V Transvaal Boot and Shoe Manufacturing Co** where he said that –

“I, have considered the ambit of plaintiff’s allegations of negligence, on the basis that it was not necessary for plaintiff, in his declaration, to allege any specific ground of negligence and that it would have been sufficient merely to alledge the bare incidents that the car was parked by the defendants agent on an incline, started off on its own accord and collided with Miss Naude while she was on the pavement...Nevertheless, plaintiff having alleged specific grounds of negligence, in my opinion, is limited to these grounds”,

and found that, where in an action for damages arising from an accident the plaintiff alleges facts which are *res ipsa loquitur* and then goes on to

²² **Groenewald v Conradie supra 187.**

particularize the cause by identifying the person responsible and alleging specific acts of negligence the plaintiff has limited his case and has conveyed that limitation to the defendant. Should the defendant admit the *res ipsa loquitur* facts and plead an explanation no new issue is created although the defendant will attract a duty to adduce some rebutting evidence in support of the explanation. He further found that whether or not the plaintiff alleges *res ipsa loquitur* the defendant has a duty to plead a defence or explanation such as sudden mechanical failure so that the plaintiff is alerted to evidence for which he may otherwise be unprepared ²³.

It appears that when the plaintiff alleges *res ipsa loquitur* the defendant must either admit or deny or confess and avoid all the material facts alleged by the plaintiff or state of the stated facts are not admitted. He must also clearly and concisely state all the material facts upon which he relies. This means that the defendant will not be entitled to rely on a defence which he has not specifically pleaded ²⁴.

²³ **supra 185ff.**

²⁴ Cooper 113.

Should the above general principles of pleading *res ipsa loquitur* be applied in medical context the following suggestions are advanced in this regard:

1. The plaintiff should clearly and concisely plead the facts upon which *res ipsa loquitur* is alleged.
2. If the plaintiff relies on specific acts of negligence arising from a medical accident it is submitted that this should not preclude him from relying on *res ipsa loquitur* provided that he pleads those facts as an alternative.
3. The defendant should clearly and concisely plead all the facts upon which his explanation in rebuttal is based. If the defendant denies the *res ipsa loquitur* allegation without pleading an explanation he should not be permitted to do so at the trial because the plaintiff will be unprepared to meet such evidence at that stage of the proceedings.
4. A clear and concise exposition of the facts which establish the defendant's exculpatory explanation in his plea provides the opportunity for the plaintiff to adequately prepare for trial and could conceivably also facilitate out of court settlements where the explanation in rebuttal is of such a nature that the plaintiff, who bears the *onus*, would have little prospect of success at the trial.

6.6 CLOSING REMARKS

The principles relating to the application of the doctrine of *res ipsa loquitur* in general, are well settled and applied consistently by South African courts. On the assumption that the doctrine of *res ipsa loquitur* will remain an important weapon in the evidentiary armament of a plaintiff in personal injury cases, it is of extreme importance that its application be extended to medical accidents for the reasons advanced supra. Provided that the doctrine is applied to limited but meritorious medical negligence actions in an even and consistent fashion remarks such as the following will be negated once and for all:

“Lawyers are often accused of using Latin tags to befuddle the public and demonstrates that the law is far too difficult to be left to mere laymen. Some Latin phrases, seem to befuddle the lawyers themselves. *Res ipsa loquitur* is a case in point”²⁵.

²⁵ Anonymous “*Does Res Ipsa Loquitur speak for itself?*” 1998 PI 6.

7. LIST OF ABBREVIATIONS

<i>AANA</i>	American Association of Nurse Anesthetists
<i>AC</i>	Appeal Cases (Law Reports)
<i>All ER</i>	All England Law Reports
<i>ALR</i>	American Law Reports Annotated
<i>Anesth Analg</i>	Anesthesia and Analgesia
<i>BMJ</i>	British Medical Journal
<i>Buff L Rev</i>	Buffalo Law Review
<i>CA</i>	Court of Appeal
<i>Cal L Rev</i>	California Law Review
<i>Cal Rptr</i>	California Reporter (West) 1959-
<i>CLJ</i>	Cambridge Law Journal
<i>CLY</i>	Current Law Year Book
<i>DePaul L Rev</i>	DePaul Law Review
<i>DLR</i>	Dominion Law Reports
<i>Georgia L Rev</i>	Georgia Law Review
<i>Harv L Rev</i>	Harvard Law Review
<i>HL</i>	House of Lords
<i>Ins Council J</i>	Insurance Law Journal
<i>ILT</i>	Irish Law Times
<i>J Clin Anesth</i>	Journal of Clinical Anesthesia
<i>JAMA</i>	Journal of American Medical Association
<i>LQR</i>	Law Quarterly Review

<i>LJKB</i>	Law Journal Reports, King's Bench, New Series 1831-1946
<i>LLR</i>	Lloyd's Law Reports
<i>LR</i>	Law Reports
<i>LT</i>	Law Times
<i>LTJ</i>	Law Times Journal
<i>Med LR</i>	Medical Law Reports
<i>Med Trial Tech Q</i>	Medical Trial Technique Quarterly
<i>Minn L Rev</i>	Minnesota Law Review
<i>NLJ</i>	New Law Journal
<i>Northwestern University L Rev</i>	Northwestern University Law Review
<i>NSWLR</i>	New South Wales Law Reports
<i>NW</i>	North Western Reporter
<i>Oklahoma L Rev</i>	Oklahoma Law Review
<i>PMILL</i>	Personal and Medical Injuries Law Letter
<i>Pacific L Rev</i>	Pacific Law Review
<i>PN</i>	Professional Negligence
<i>QB</i>	Queen's Bench (Law Reports)
<i>R CL</i>	Ruling Case Law
<i>SALJ</i>	South African Law Journal
<i>SCC</i>	Supreme Court of Canada
<i>SJ</i>	Solicitor's Journal
<i>So Cal L Rev</i>	Southern California Law Review
<i>Stan L Rev</i>	Stanford Law Review
<i>SW</i>	South Western Reporter

Tennessee L Rev

Tennessee Law Review

THRHR

Tydskrif vir Hedendaagse Romeins-
Hollandse Reg

TSAR

Tydskrif vir die Suid Afrikaanse Reg

Utah L Rev

Utah Law Review

Vir L Rev

Virginia Law Review

Wake Forest L Rev

Wake Forest Law Review

Wayne L Rev

Wayne Law Review

WWR

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