Malpractice: The Layman's Common Medical Knowledge and Experience and Res Ipsa Loquitur

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MALPRACTICE: THE LAYMAN'S COMMON MEDICAL KNOWLEDGE AND EXPERIENCE AND RES IPSA LOQUITUR

In a suit for injuries caused by alleged malpractice, the burden is on the plaintiff to prove the want of reasonable and ordinary care or skill of the physician or surgeon. A physician or surgeon is presumed to exercise his legal duty of ordinary skill and care, and in the absence of proof to the contrary, it is presumed that he carefully and skillfully treated or operated on his patient. No presumption of negligence is to be indulged from the fact of injury or adverse result of treatment of, or operation on, a patient. Courts, however, may aid the plaintiff in fulfilling his burden by invoking the doctrine of *res ipsa loquitur*, under certain fact situations. Wisconsin recently joined the ranks of those jurisdictions which allow such an inference of negligence. In *Fehrman v. Smirl* the plaintiff had experienced difficulty in voiding urine for some months. He consulted the defendant who advised him that he would have to undergo surgery for the removal of his prostate gland. The operation was performed and resulted in permanent urinary incontinence due to damage of the external sphincter, a ring of muscle about one and one-half inches from the prostate gland which controls the flow of urine from the bladder. Plaintiff brought an action against the defendant doctor, alleging failure to use and exercise the proper degree of skill, care and judgment. Expert witnesses testified on behalf of the plaintiff, and at the end of the trial a request was submitted for an instruction on *res ipsa loquitur*. The trial court denied the request, and the Supreme Court reversed this decision on appeal:

As a permissible inference, the effect of the doctrine of *res ipsa loquitur* is merely to permit the jury to draw a reasonable inference from circumstantial evidence. It would seem to logically follow from this that situations may arise in medical malpractice actions in which it will be proper to invoke the doctrine of *res ipsa loquitur*. We can perceive of no justification for adhering to the rule that *res ipsa loquitur* may never be applied in this type of case. . . . Nevertheless, this does not mean that an instruction embodying the doctrine of *res ipsa loquitur* is proper in every medical malpractice case.

The court ruled that *res ipsa* may properly be invoked in two types of situations: "... where a layman is able to say as a matter of common knowledge that the consequences of the professional treatment are not those which ordinarily result if due care is exercised," and "... where there is no basis of common knowledge for such a conclu-

141 Am. JUR. Physicians and Surgeons §§125, 127 (1942).
220 Wis. 2d 1, 121 N.W. 2d 255 (1963).
3 Note 2 supra at 21, 121 N.W. 2d at 265.
4 Id. at 22, 121 N.W. 2d at 266.
sion, expert testimony may be a sufficient foundation for it.”

The court determined that the injury in question resulted from complicated and involved surgery, and consequently it was not within the purview of a layman’s common knowledge or experience.

This case presents several interesting and involved issues. This article, however, will deal with only one particular question; namely, what type of fact situations qualify as matters within the common knowledge and experience of a layman.

Malpractice and Res Ipsa Loquitur

The standard of care required of a physician or surgeon was enunciated in a recent case:

... when a physician exercises that degree of care, diligence, judgment, and skill which physicians in good standing in the same school of medicine usually exercise in the same or similar localities under like or similar circumstances, having due regard to the advanced state of medical or surgical science at the time, he has discharged his legal duty to his patient.  

In the earlier stages of the development of the law, an injured party was required to produce expert medical testimony in order to establish a breach of that duty. The inauguration of *res ipsa loquitur* into medical malpractice cases resulted from the logical progression of the law, and a recognition by the courts that certain malpractice cases were not significantly different from those cases in which the doctrine had been applied. Moral justification for the invocation of the doctrine on behalf of injured patients arose from the realization that the medical profession had become united in the so-called “conspiracy of silence,” and as a consequence it became all but impossible to get medical men to testify against each other. As a result the most flagrantly negligent operations and treatments were often allowed to go uncompensated.

Limitations of the Doctrine

Several rather general restrictions have been formulated by the courts with respect to the application of the doctrine in order to prevent excessive “jury speculation” and to protect defendant-doctors from sympathetic verdicts. Courts recognize that a doctor’s constant contacts are with the frailties, idiosyncrasies, physical and mental weaknesses, and allergies of human nature, which may affect a patient’s condition and yet be beyond his control. It is also a judicially recognized fact that medical science is not wholly empirical, but that there are inherent in medical treatment many variables and imponderables which are neces-

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5 Id. at 25, 121 N.W. 2d 268, quoting from Prosser, Torts §42, at 202 (1955).
6 Ahola v. Sincock, 6 Wis. 2d 332, 348, 94 N.W. 2d 566, 576 (1958).
8 Morgensen v. Hicks, 253 Iowa 139, 110 N.W. 2d 563, 566 (1961).
sarily beyond the realm of common knowledge and experience. These and other considerations have prompted courts to formulate general categories for application of the doctrine.

This doctrine is, however, generally restricted to cases of injuries inflicted by a mechanical apparatus or some other inanimate object within the defendant's exclusive control. It does not ordinarily apply to cases of injuries caused by the careless act or thoughtless omission of a human being. It follows, hence, that there is no sound basis for extending it to actions for negligence against a member of a learned profession. To do otherwise would practically require him to guarantee success in every case. Such a course would be contrary to the principles of fairness to the professions and against the best interests of the public. It would cast an undue burden on the medical profession and might place every doctor on the defensive against any disgruntled patient he has failed to cure.

A more refined categorization was formulated by the New Jersey court:

Nor is this a case in which plaintiff complains of the method used by the doctor in his post-operative treatment. He does not charge defendant with lack of professional skill, discretion or judgment, in which case the question of whether the doctor followed standards recognized by the medical profession would be material. (Citations omitted.) Rather, plaintiff charges that defendant negligently and carelessly used a caustic in treating Arlene's nose. This distinction is crucial, for it is the type of negligence which lay jurors can appreciate without the testimony of medical experts to describe the applicable standard of care. (Citations omitted, emphasis added.)

Our own court adopted the now universally imposed limitation that the mere fact that the injury is unusual or rare will not provide a proper basis for invoking the use of the rule. Even with this limitation, concern has been voiced that the legal profession is seemingly oblivious to the inherent element of risk involved in medical practice. These feelings have been summed up as follows: There may in fact be errors in either procedure or judgment, but at the present level of medical intelligence they can be determined only in retrospect, if at all. To be sure, errors of today may well amount to actionable negligence tomorrow, but until medical advancement establishes the error and its solution, no duty of prevention should arise. Courts have recognized this problem and consequently will not employ res ipsa merely on the basis

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12 Note 2 supra at 24, 121 N.W. 2d at 266.
13 Mills, Res Ipsa Loquitur and the Calculated Risk In Medical Malpractice, 30 So. CAL. L. Rev. 83 (1956).
of adverse results. In addition, some courts have indulged in mathematical computations:

A *sine qua non* to the application of the doctrine is that the resulting injury must be of a kind which ordinarily does not occur in the absence of negligence. In this case the undisputed testimony is that injuries of this type do occur about 2% of the time, irrespective of how careful the surgeon is and irrespective of which surgical technique he adopts.

The general rules as outlined above are helpful in understanding the court's approach to a particular fact situation. However, as is true of most "general rules" they lose their value when directly applied to a particular fact situation. In most instances, the courts have remained conservative in allowing the application of *res ipsa loquitur*. However, in several cases it appears as though the ruling court has blinded itself to the dangers of a liberal application. The following is a comprehensive although not exhaustive list of the more recent cases in which the applicability of the doctrine of *res ipsa loquitur* has been drawn into question. Only those cases which deal with the doctrine on the basis of the ordinary layman's common knowledge and experience are cited, and Wisconsin cases have also been cited when their fact situations are such that the results of those cases would probably have been different under present law. The cases are categorized according to the type of medical treatment involved.

**Anesthesia**

In an action against a hospital and a physician, for injuries sustained by plaintiff when an explosion occurred within her nasal passages during the removal of a wart from her nose with a hot electric needle, while she was under a non-explosive anesthetic and before the administration of ether, the California court applied *res ipsa*. The same court applied the rule in a case in which the plaintiff suffered temporary paralysis after she received a spinal anesthetic prior to childbirth. A contrary result was reached in a Texas case, where the court refused to apply *res ipsa* after the plaintiff's lower extremities became paralyzed subsequent to the administration of a spinal anesthetic by the defendant.

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16 Dierman v. Providence Hosp., 31 Cal. 2d 290, 188 P. 2d 12 (1947). The court here applied the common knowledge test, and not the unusual result theory.
18 Porter v. Puryear, 258 S.W. 2d 182 (Tex. Civ. App. 1953). Texas does recognize the rule of *res ipsa loquitur*. A similar result was reached in Ayers v. Parry, 192 F. 2d 181 (3d Cir. 1951). The doctrine was rejected because the injury could have occurred although proper care was used and because the case was based on lack of skill in diagnosis and method or manner of treatment.
The rule has been held not to apply where the machine used to administer the anesthetic explodes,\textsuperscript{19} or when the administration of an anesthetic to an intoxicated person causes death.\textsuperscript{20} However, in a case in which the plaintiff was burned on her face by allegedly improper administering of the anesthesia, counsel's opening argument premised on rules of \textit{res ipsa} was held to be proper.\textsuperscript{21} An allergic reaction to a particular anesthesia is not grounds for invoking the doctrine.

\textbf{Diagnosis}

The general rule with regard to incorrect diagnosis was enunciated by the Florida court in a case in which the defendant obstetrician diagnosed the plaintiff as not pregnant, when in fact she had been pregnant for five months. The court stated: "... Generally, the doctrine of \textit{res ipsa loquitur} does not apply in a malpractice case where negligence is charged in diagnosis or treatment.\textsuperscript{22}

A test for determining whether a layman might possess the requisite knowledge was formulated by the California courts.\textsuperscript{23} In this case the plaintiff had developed cramps in his legs. Such pains were diagnosed by the defendant as an occlusion of the abdominal aorta causing a reduction in the blood supply to his legs. One of the methods used by the defendant to confirm his diagnosis was the injection of a radio opaque material into his aorta. Plaintiff's lower extremities became paralyzed. In rejecting the application of the doctrine the court stated:

... aortography and its results, because it is a relatively new diagnostic procedure, is not a matter of common knowledge among laymen. ... Particularly is this so, when it is performed upon a person with the advanced degree of arteriosclerosis possessed by the plaintiff.\textsuperscript{24} (Emphasis added.)

\textit{Res ipsa loquitur} has been applied in some cases involving diagnosis, but this is done generally only in peculiar situations, which do not involve the ordinary tort liability concepts. Michigan applied it in a case brought on a contract made with the defendant-doctor to perform a caesarean section, when the defendant failed to operate in time to save the child's life.\textsuperscript{25}

\textsuperscript{19} Wilt v. McCallum, 214 Mo. App. 321, 253 S.W. 156 (1923).
\textsuperscript{20} Loudon v. Scott, 58 Mont. 645, 194 Pac. 488 (1920). See also, Hasemeir v. Smith, 361 S.W. 2d 697 (Mo. 1962).
\textsuperscript{22} Crovilla v. Cochrane, 102 So. 2d 307, 311 (Fla. 1958). See also: Sidling v. Maher, 71 Ohio L. Abs. 571, 113 N.E. 2d 373 (1953); Ingram v. Harris, 244 Ala. 246, 13 So. 2d 48 (1943); Morgenstein v. Hicks, \textit{supra} note 8.
\textsuperscript{23} Salgo v. Leland Stanford Jr. U. Board of Trust, 154 Cal. App. 2d 560, 317 P. 2d 170 (1957). See also, Huffman v. Lindquist, 37 Cal. 2d 465, 234 P. 2d 34 (1951), where the patient died due to blood clot after treatment of fractured skull received in automobile accident and \textit{res ipsa} was not applied.
\textsuperscript{24} Salgo v. Leland Stanford Jr. U. Board of Trust, note 23 \textit{supra}, at 176.
\textsuperscript{25} Stewart v. Rudner, 349 Mich. 459, 84 N.W. 2d 816, 826 (1957). In cases founded on contracts such as this the plaintiff is not confronted with as difficult a task in establishing his case: "It was his burden to show the jury..."
In the case of Kosak v. Boyce, the plaintiff had a sharp pain in his eye. He consulted the defendant doctor several times, and the defendant treated a scratch on the eye but failed to discover a small sliver of steel which had caused the injury. The plaintiff became dissatisfied with his progress, and consulted another physician who, after several examinations, discovered the piece of steel by the use of an X-ray machine. The Wisconsin court held that the jury was justified in finding the defendant negligent in failing to use the X-ray machine, but the case was reversed on other grounds. It would seem that failure to employ proper and recognized methods for diagnosis would provide a proper foundation for invoking res ipsa.

General Practice

Some rather surprising and contradictory rulings have evolved in this area, especially with respect to injections. In a case where the plaintiff underwent severe reactions to a shot of penicillin, the New Jersey court stated:

The practice of medicine concerns itself with a relatively inexact science. There are many variables and imponderables concerning hypodermic injections which are not within the common knowledge and experience of men. These factors lend meaning to the ordinary rules which require expert proof of the standard practice and deviation therefrom in cases such as this.

With a process of reasoning wholly incompatible with the New Jersey court, California has invoked the doctrine under similar circumstances.

While injections and the use of Thex (a vitamin B complex) are primarily medical matters, it is a matter of common knowledge among laymen that injection in the muscles of the arm, as well as other portions of the body, do not cause trouble unless unskilfully done or there is something wrong with the serum. Needle injections of cold shots, penicillin, and many other serums have become commonplace today. . . .

It has been held to be common knowledge among laymen that the giving of an enema is not ordinarily harmful unless negligently done. Res ipsa has been applied when the plaintiff suffered serious burns from

with reasonable (not mathematical) certainty that if the defendant had caused the operation to be performed in accordance with his agreement, the surgeon would then have delivered, alive, the baby whose strong and normal heart tones were so clearly audible." There is no question of skill or care in treatment involved.

26 185 Wis. 513, 201 N.W. 757 (1925).
27 Toy v. Rickert, supra note 9.
28 Bauer v. Otis, 133 Cal. 2d 439, 284 P. 2d 133, 136 (1955). Surprisingly, in a subsequent case in which the plaintiff developed an ulcer where the defendant had injected opaque iodine for X-ray purposes, California rejected the doctrine. See also, Pack v. Nazareth Literary and Benevolent, Inc., 362 S.W. 2d 816 (Tenn. 1962). Here res ipsa was applied when the plaintiff developed a sterile abscess after an injection of dramamine. The court noted that no reactions were suffered by plaintiff from prior injections.
a silver nitrate pencil used by the defendant-doctor to outline veins to be removed,30 and where scars were received due to warm compress treatments of a leg which resulted in burns.31 The application of the doctrine has been rejected in cases involving arsenic poisoning from medicine32 and where a leg was lost as the result of treatment of an injured foot with a tourniquet on the leg.33

**Obstetrics**

It has been held to be a matter of common knowledge among laymen that the routine delivery of a child should not result in the mother having a paralyzed leg34 and that *res ipsa* was properly invoked when a sponge was left in the uterus following a delivery.35 Minnesota applied the rule to a case in which the defendant delivered plaintiff of a five-month old foetus. On the next day he removed the placenta but left a piece of it which putrified causing blood poisoning, gangrene and loss of a leg.36 When the plaintiff suffers broken bones and crushed vertebra during delivery, *res ipsa* may properly be invoked.37 Serious burns received by a mother due to excessively hot applications during a caesarean operation also give rise to *res ipsa*.38 Under very similar circumstances the Connecticut court recognized the emergency of the situation as a mitigating factor.

As to Dr. LaBrecque, *it seems clear that he was faced with an emergency*, that he assumed charge and that through his efforts and those of the hospital staff under his direction the plaintiff's life was saved. We fail to see that there was evidence of any neglect on his part, much less gross neglect. . . . 39 (Emphasis added.)

**Orthopedics**

*Res ipsa loquitur* will not be applied merely because a broken bone fails to heal.40 However, evidence that the defendant-doctor failed to watch the healing process and to continue adequate treatment has been

30 Hurt v. Susnow, 192 P. 2d 561 (Cal. 1948).
36 Miles v. McNaughton, 67 Minn. 46, 69 N.W. 480, 481 (1896) where the court stated: "Unexplained, the evidence was sufficient to justify the conclusion that the defendant, in the exercise of that degree of care and skill which the law exacts of a physician, might and ought to have reasonably discovered and removed the remnant of the afterbirth."
37 Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W. 2d 659 (1950).
38 Timbrell v. Suburban Hosp., 4 Cal. 2d 68, 47 P. 2d 737 (1935). See also, Danville Comm. Hosp. v. Thompson, 186 Va. 746, 43 S.E. 2d 882 (1947) where *res ipsa* was applied when a baby was burned between the time it left the delivery room and the time of discovery of the burn the next day, during which time it was in possession of the hospital.
40 Gebhardt v. McQuillen, 230 Iowa 181, 297 N.W. 301 (1941).
held sufficient grounds for application of the doctrine. Cases involving casts that are too tightly set are in complete discord. Both Arkansas and Minnesota rejected application of the doctrine when injuries were sustained from tight casts. Iowa has adopted what appears to be a diametrically opposed rule. In a case in which the cast was so tight on plaintiff's leg that it prevented circulation of the blood causing infection and subsequent amputation, the court stated:

It is a matter of common knowledge that such things do not ordinarily occur in connection with treatment by physicians exercising ordinary skill. One need not have scientific knowledge to know that any such result is ordinarily unnecessary if the physician exercises reasonable care.

Failure to set a fracture properly or to discover by the use of X-ray whether the set is good have given rise to the doctrine. In a related question, how long a cast should be permitted to be worn, the Washington court has stated:

We are clearly of the opinion that the question of whether or not the leaving of this cast on for the additional period of two months caused the injury complained of, or whether or not it is reasonable to infer that it did, are questions which can properly be determined only by medical experts, and are not questions which may be determined by circumstances such as appear in this case, and upon which respondent relies to prove his case.

In Ahola v. Sincock the plaintiff, four years old, suffered a fractured left leg. The defendant put the leg in traction and applied diminishing amounts of weight. Several days later the splint was removed due to circulatory disturbance. Plaintiff had sustained hermatoma involving about ten inches of calf and pressure area over the knee. The case was tried on the theory that the defendant had applied too much weight while the leg was in traction. The Wisconsin court stated: "The plain-

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41 Covington v. James, 214 N.C. 71, 197 S.E. 701 (1938), where defendant set a broken leg and then did not see the patient again for a week during which time the leg swelled, abscessed and burst; Bradshaw v. Wilson, 94 N.E. 2d 706 (Ohio Ct. App. 1950).

42 Brown v. Dark, 196 Ark. 724, 119 S.W. 2d 529 (1938).


44 Daiker v. Martin, 250 Iowa 75, 91 N.W. 2d 747, 752 (1958).

45 Olson v. Weitz, 37 Wash. 2d 70, 221 P. 2d 537 (1950), the bones were not aligned so open reduction was later necessary.

46 Howell v. Jackson, 65 Ga. App. 422, 16 S.E. 2d 45, 47 (1941), where the court stated: "The jury was authorized to find that the failure of the doctors to follow the progress, or lack of proper progress in the healing of the broken arm, by the use of X-ray for over five weeks was negligence on their part ... and that the failure to employ the X-ray, an available and well-known means for obtaining such data, was a lack of ordinary care and diligence on the part of the doctors." Kentucky, in Merker v. Wood, 307 Ky. 331, 210 S.W. 2d 946 (1948) held that expert testimony must be used to establish negligence in failing to use X-ray in checking healing progress of a broken leg.

47 Crouch v. Wyshoff, 6 Wash. 2d 273, 107 P. 2d 339 (1940).

48 6 Wis. 2d 332, 94 N.W. 2d 566 (1958).
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tiff having made no request in the trial court for instructions as to the doctrine of *res ipsa loquitur* or its application in this case, it cannot be considered here." 49

This case presents a close issue as to the applicability of the doctrine when compared with the above cases. Certainly such a result is highly undesirable, and, in the realm of common experience, rather "unusual," but it involves a question of medical determination and judgment. It is likely that cases such as this would require expert testimony in order to give rise to *res ipsa*.

**Psychiatry**

It seems to be well settled that *res ipsa loquitur* is not properly invoked in cases of injuries received in the course of electro-shock treatments. 50

**Surgery**

This area of medical practice has given rise to the vast majority of litigation, and is perhaps the most difficult area in which to determine the applicability of the doctrine of *res ipsa*, due to its peculiarly scientific nature. The classic example of the situation in which it is proper to allow an inference of negligence is when a surgical sponge is left in the wound. There are myriad cases in which this situation is present. 51

The general rule that *res ipsa* will not be applied merely because the result of the treatment is adverse has many applications in surgery. No

49 Id. at 349, 94 N.W. 2d at 576.

50 Quinley v. Cocke, 183 Tenn. 428, 192 S.W. 2d 992 (1946); Farber v. Olkon, 40 Cal. 2d 503, 254 P. 2d 520 (1953); Johnson v. Rodis, supra note 10.

51 Leonard v. Watsonville Comm. Hosp., 47 Cal. 2d 992, 305 P. 2d 36, 39 (1956): "When a foreign object is unintentionally left in a patient's abdomen it is ordinarily the result of the negligence of someone." Sellers v. Noah, 209 Ala. 103, 95 So. 167 (1923), (needle left in body after appendectomy); Tiller v. VonFohle, 72 Ariz. 11, 230 P. 2d 213 (1951), (cloth sack); Slimak v. Foster, 106 Conn. 366, 138 Atl. 153 (1927), (piece of surgeon's blade that broke off during the removal of a bony spur in plaintiff's nose); Dietze v. King, 184 F. Supp. 944 (E.D. Va. 1960), (surgical sponge). This is just a sampling of the cases in which this problem has arisen.

Two rather unusual decisions were reached in New York and Massachusetts. In Blackburn v. Baker, 227 App. Div. 583, 237 N.Y.S. 611, 613 (1929) the court stated: "The presence of the pack-off in the abdomen after the first operation, standing by itself, suggested that proper care had not been used, and required defendant to offer proof in explanation. But, when defendant's expert witness stated that *proper and approved methods* were used in the operation, the possible inference of negligence because the pack-off had been left in the abdomen was destroyed." (Emphasis added.) This case has not been reversed, and so it seems that it may in fact be proper treatment to leave a sponge in an incision.

In Guell v. Tenney, 262 Mass. 54, 159 N.E. 451 (1928) the court held that the defendant-doctor was not negligent when a sponge was left in plaintiff's incision since neither he nor the assisting nurses had assumed responsibility to count the sponges, and the nurses were not his agents. "There was no evidence warranting a finding that, in the exercise of that degree of care and skill required of him, he could have discovered the sponge left in the plaintiff's body before completing the operation; nor was there any evidence to show that his care and treatment of the plaintiff thereafter were unskilled or improper."
inference of negligence arises from the fact that the patient died following a tonsillectomy operation, nor when blindness resulted from an operation on an eye after a magnet failed to remove a foreign body from the eye, nor when “foot drop” results from an operation to correct a knee. The doctrine will not be invoked when a doctor fails to discover that a peg used in a hip-pinning operation has moved into the bladder, nor where the defendant unsuccessfully operated to remove a piece of metal and the plaintiff lost his arm. Adverse results from surgery such as scars resulting from the use of clamps, paralysis of the face after a mastoid operation, or loss of voice after a throat operation do not form a proper basis for applying the rule. 

Res ipsa was not applied where the plaintiff consulted the defendant about an attack of glaucoma (excess pressure on the eye from body fluids). In this case the defendant began treatment and then went on a four or five day vacation during which time plaintiff lost her vision in one eye.

A difficult problem arises when a healthy part of the patient's anatomy which is in close proximity to the injured area is damaged during surgery. In a case where the defendant allegedly negligently sewed a nerve into the soft tissue adjacent to the surgical incision which he had made for a hernia operation, the court stated:

The law is well settled that facts relating to difficult surgical operations call for knowledge far beyond the ordinary layman, and resort must be had to testimony of expert witnesses for light on the subject of whether or not the defendant has been guilty of negligence.

52 Sanders v. Smith, 200 Miss. 551, 27 So. 2d 889 (1946); Stephens v. Williams, 226 Ala. 534, 147 So. 608 (1933) Johnson v. Arndt, 186 Minn. 253, 243 N.W. 67 (1932). But see, Cavero v. Franklin Gen. Benev. Soc., 36 Cal. 2d 301, 223 P. 2d 471 (1950) where res ipsa was applied when death occurred during a tonsilllectomy due to hemorrhage and accumulation of blood in lungs. It does not ordinarily occur and it is within the knowledge of laymen.


55 Meador v. Arnold, 264 Ky. 378, 94 S.W. 2d 626 (1936).


57 Johnson v. Colp, 211 Minn. 245, 300 N.W. 791 (1941).

58 Schoening v. Smith, 59 N.D. 592, 231 N.W. 278 (1930); Calhoun v. Fraser, 23 Tenn. App. 54, 126 S.W. 2d 381 (1938).

59 Nelson v. Murphy, 42 Wash. 2d 737, 258 P. 2d 472 (1953).


61 Richison v. Nunn, 57 Wash. 2d 1, 340 P. 2d 793, 801 (1959). Similar results were reached in the main case, Fehrman v. Smirl, supra note 2, and in DiFilippo v. Preston, supra note 15; plaintiff was operated on for removal of thyroid and an injury was sustained to the recurrent laryngeal nerves, resulting in a paralysis of the vocal cords. The thyroid and recurrent laryngeal nerves touch. Indiana rejected application of the doctrine in a case involving an operation to correct an incisional hernia during which the bowel of the plaintiff was cut. Worster v. Caylor, 231 Ind. 625, 110 N.E. 2d 337 (1953), reversing, Worster v. Caylor, 106 N.E. 2d 108 (1952).
However, in a case where the defendant-doctor, operating on plaintiff's leg, ligated an artery rather than a vein with resultant gangrene and required amputation, *res ipsa* was allowed.\(^6\) In a case where the defendant cut off a part of plaintiff's tongue while removing her adenoids, the Iowa court stated: "It is a matter of common knowledge and observation that such things do not ordinarily attend the service of one possessing ordinary skill and experience in the delicate work of surgery. . . ."\(^6\)

Cases involving the insertion of endotracheal tubes into the patients' esophagi in such a fashion as to puncture the esophagus have resulted in contrary results in Pennsylvania\(^6\) and Kansas.\(^6\) In the Pennsylvania case, the court stated:

It is thus abundantly clear that since, in all such malpractice cases involving an appraisal of the propriety and skill of a doctor or surgeon in his professional treatment of a patient, a lay jury would presumably lack the necessary knowledge and experience to render a just and proper decision. . . .\(^6\)

*Res ipsa* has not been applied when the instrument being used by a doctor in treating a patient breaks and causes injury\(^6\) or where the patient suffered shocks from an electrical-surgical unit used in an operation.\(^6\) In a case in which the defendant-doctor removed the uvula and a portion of the soft palate during a tonsillectomy, the California court stated: "It would appear to be a matter of common knowledge that the removal of a portion of the soft palate and of the uvula is no part of a tonsillectomy."\(^6\) Under an identical fact situation the North Dakota court refused to apply *res ipsa*.\(^7\)

Cases involving injuries sustained while under anesthesia are also difficult to reconcile. What appears to be the generally accepted rule was stated by the Iowa court:

We think it is a just and logical conclusion that one who, while undergoing a surgical operation, sustained an unusual injury to a healthy part of her body not within the area of the operation,

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\(^{6b}\) Evans v. Roberts, 172 Iowa 653, 154 N.W. 923, 925 (1955). *Res ipsa* was rejected in Chubb v. Holmes, 111 Conn. 482, 150 Atl. 516 (1930) where the defendant-dentist cut plaintiff's tongue while digging for roots of an extracted tooth.

\(^{6c}\) *Res ipsa* was rejected, Robinson v. Wirts, 387 Pa. 291, 127 A. 2d 706 (1956). Under an identical fact situation this decision was *affirmed* in Demchuk v. Brawlow, 404 Pa. 100, 170 A. 2d 868 (1961). Both decisions received a vigorous dissent from Justice Musmanno.

\(^{6d}\) Voss v. Bridwell, 188 Kan. 643, 364 P. 2d 955 (1961). The court held that such results indicate negligence and an ordinary person can so infer from knowledge and experience.

\(^{6e}\) Robinson v. Wirts, *supra* note 64, at 710.

\(^{6f}\) Hine v. Fox, 89 So. 2d 13 (Fla. 1956).

\(^{6g}\) Smith v. American Cystoscope Makers, 44 Wash. 2d 202, 266 P. 2d 792 (1954).


\(^{6i}\) Schmidt v. Stone, 5 N.D. 91, 194 N.W. 917 (1923).
be not precluded from invoking the doctrine of \textit{res ipsa loquitur} in an action against the doctors and nurses participating in the operation.\footnote{Frost v. Des Moines Still College of Osteo. & Surg., 248 Iowa 294, 79 N.W. 2d 306, 312 (1956). See also: Meyer v. McNutt Hosp., 173 Cal. 156, 159 Pac. 436 (1916) (burn on leg); Jensen v. Linner, 260 Minn. 22, 108 N.W. 2d 705 (1961) (acid burn on leg during appendectomy); Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W. 2d 417 (1937) (injury to eye during appendectomy). In this case plaintiff injured himself, but since he was anesthetized the court reasoned that he was an "instrumentality" in the control of the defendant-physician.}

However, the Kansas court rejected application of the doctrine when a patient, operated on for treatment of a duodenal ulcer, revived from the anesthesia and was permanently paralyzed in his right arm.\footnote{Rhodes v. DeHaan, 184 Kan. 473, 337 P. 2d 1043 (1959).} The classic case in this area is \textit{Ybarra v. Spangard}\footnote{25 Cal. 2d 486, 154 P. 2d 687 (1944). California has retreated somewhat from this extremely liberal rule.} in which the California court allowed application of the doctrine against all the individuals (including the hospital) who had participated in any way in the operation on the plaintiff after the plaintiff had established that sometime during his appendectomy, and while he was anesthetized, he had sustained a traumatic injury to his shoulder.

\textit{Res ipsa} has also been applied in cases of improper post-operative treatment, as when the doctor uses a caustic which results in burns and disfigurement of the patient's nose.\footnote{Becker v. Eisenstodt, supra note 11.}

There are several interesting Wisconsin cases in this area. In cases involving a foreign object left in a surgical incision, the problem of whether \textit{res ipsa} was properly applicable in medical malpractice cases was avoided by the imposition of strict liability. In \textit{Mayer v. Hipke} the court stated: "... a surgeon who has left in the patient's body a foreign substance cannot relieve himself from liability by showing that he followed the approved practice of the profession in his community."\footnote{183 Wis. 382, 333, 336 (1924). This rule was originally formulated in Paro v. Carter, 177 Wis. 121, 188 N.W. 68 (1922). Both cases involved gauze packs left in the patient.}

In \textit{Hafemann v. Seymer}\footnote{195 Wis. 625, 219 N.W. 375 (1928).} the defendant, without having sterilized his hands, performed an operation and the patient died from blood poisoning. Both parties produced expert testimony, but the witnesses were primarily concerned with the issue of causation. In its opinion the court stated:

This does not present a situation where the jury can do no more than guess or conjecture. ... It seems clearly within the reasonable probabilities that the operation would have been safely performed if the defendant had used good surgical practice.\footnote{Id. at 632, 219 N.W. at 377.}
It seems quite likely, from the language used by the court, that if the question had been raised \textit{res ipsa} would have been allowed.

In \textit{Morrison v. Henke},\textsuperscript{78} the plaintiff received burns on her legs from the application of hot water bottles. A verdict for the defendant was sustained on the basis that the nurses who placed the bottles there were not the agents of the doctors. It would seem that this type of fact situation should present a proper basis for the application of the doctrine.

\textit{Dentistry}

It is a matter of common knowledge and experience that a dentist who removes a healthy tooth, leaving the decayed one in, is not acting with the care and skill required by law,\textsuperscript{79} and also that a dentist as part of his professional duty when extracting a tooth, should treat the bruised and bleeding socket.\textsuperscript{80} \textit{Res ipsa} may be applied where a patient submits herself to the care and custody of an anesthetist and an oral surgeon for the purpose of having her teeth extracted, when, during the administering of the anesthetic, one of her teeth becomes dislodged and enters her lung.\textsuperscript{81}

But, in a case in which the plaintiff's jaw was fractured during a tooth extraction, \textit{res ipsa} was rejected and the court stated:

Laymen cannot be required to decide what amount of force is necessary to extract a tooth under any given set of circumstances. The degree of force to be used is an integral part in the technique of extracting teeth. This professional technique is developed only after study and practice under men of experience.\textsuperscript{82}

In \textit{Krueger v. Chase}\textsuperscript{83} the plaintiff was treated by the defendant-dentist. Thereafter she coughed up two pieces of teeth and one silver filling, which she had swallowed. She suffered pneumonia and an abscess of her lung which concededly was caused by the foreign objects. The plaintiff was denied recovery on the basis that the injury was caused by an unavoidable accident since the defendant had done all that he could to prevent such an occurrence. Would the same reasoning be deemed appropriate today?

\textit{X-Ray}

The cases in this area seem to be in hopeless confusion. When a burn results from treatment by X-ray machines, the courts are divided.\textsuperscript{84}

\textsuperscript{78} 165 Wis. 166, 160 N.W. 173 (1917).
\textsuperscript{80} Barham v. Widing, 210 Cal. 206, 291 Pac. 173 (1930).
\textsuperscript{83} 172 Wis. 163, 177 N.W. 510 (1920).
When a burn occurs while an X-ray picture is taken of the plaintiff res ipso may be applied, but it has been rejected in cases of pictures of teeth and of a heel to locate a needle. The doctrine has also been rejected in cases involving excessive doses of radioactive cobalt during radiation therapy following a radical mastectomy.

The Wisconsin cases involving X-ray burns are somewhat inconsistent. In Rost v. Roberts, the plaintiff received burns on his back from an X-ray treatment for acne. In this case the court stated:

By this instruction the jury were informed that they might consider the fact that plaintiff was burned as evidence of defendant's negligence, in connection with all the other evidence in the case. This really accords the plaintiff the full benefit of the res ipso loquitur rule and was as favorable to him as the law permits. The alleged error resulting from placing the burden of proof on the plaintiff cannot be sustained.

However, in two subsequent cases it was held error to instruct the jury that the fact of a burn from an X-ray could be considered in determining whether the defendant was negligent. Rost v. Roberts was cited as authority for this ruling. The basis for these later decisions was that the burn could have been due either to an overdose of X-ray, or to hypersensitive skin; and that there is no way of diagnosing in advance whether the skin of any individual is hypersensitive to the X-ray. It would appear, therefore, that if it is now possible to determine a person's reaction to an X-ray exposure in advance of treatment, any X-ray burns will now afford a proper foundation for res ipso.

Lesson Derived From Cases

A cursory study of these examples reveals that what constitutes "common knowledge and experience" is by no means common knowledge itself. It is not unusual to find two courts in utter disagreement over an identical fact situation. This is true even though only California at one time employed the "unusual result" theory for determining when an inference of negligence may be indulged in. All courts professedly use the same standards and tests, but unlike medicine which is substantially the same everywhere, the law varies from jurisdiction to jurisdiction. This diversity in the application of the doctrine illustrates the existence of the danger that laymen may be permitted to exercise and

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85 Jones v. Tri-State Telephone & Telegraph Co., 118 Minn. 217, 136 N.W. 741 (1912).
87 Routen v. McGehee, 208 Ark. 501, 186 S.W. 2d 779 (1945).
89 180 Wis. 207, 192 N.W. 38 (1923).
90 Id. at 214, 192 N.W. at 41.
apply their own "medical" diagnoses to different factual situations. Certainly, the actual medical knowledge possessed by a lay juryman, on the average, is virtually the same in every corner of the country. Why then, should various courts differ so greatly in their decisions? Perhaps the answer lies in the natural feeling of sympathy for an injured person who has not been able to procure expert medical testimony and who would not otherwise be able to recover.

**Trial Court**

Initially, the question of whether the jury is competent to pass judgment on the actions of a physician or surgeon is in the discretion of the trial court, for it must determine whether or not to submit the case to the jury. What type of approach will the Wisconsin court take on this question? The *Fehrman* case suggests some guidelines. The court, in its opinion, illustrated the proper application of the rule by citing conservative examples, and decried the injustice and inherent difficulties of any test based on the rarity of the injurious result. In addition, the *Fehrman* case provided for application of *res ipsta loquitur* based on expert testimony. Perhaps, in view of the conservative view advanced, *res ipsta* will be relegated to the patently obvious situations such as the failure to remove a surgical sponge after an operation; while the more complex and involved problems will require at least some expert testimony. Such an approach would, to some degree, prevent juries from rendering purely sympathetic verdicts, thus protecting doctors from arbitrary judgments. It would also afford the injured plaintiffs a much desired facility in sustaining their cases, where it is quite evident that the injuries are the results of the doctor's negligence.

**Rules for Application of Res Ispa Loquitur**

The examples and general rules cited in this article provide several helpful guidelines and tests that may be employed by the trial court in making its determination as to whether the cause should be submitted to the jury. Briefly, the factors that should be considered are:

1. Is the question of the defendant-doctor's use of the proper degree of skill and care essential?
2. Was the injurious result merely unusual and rare?
3. Is there an established, unavoidable percentage of risk involved in the procedure in question?
4. Is it a question of proper diagnosis?
5. Did the injury result from the application of a newly discovered method of treatment or diagnosis?
6. If the injury resulted from surgery, was the operation complex and involved, or was the injured portion of the plaintiff's anatomy located in close proximity to the area being operated upon?

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93 Note 2 *supra* at 24, 121 N.W. 2d at 266-67.
94 Note 2 *supra* at 25, 121 N.W. 2d at 268.
If one or several of these factors applies to the case under consideration, the trial court should be reluctant to allow the plaintiff a chance of recovery unless he can and does establish his case by expert testimony. This may seem like a harsh, overly restrictive test that defeats the purpose of allowing the application of *res ipsa loquitur*; but it must be borne in mind that this doctrine is not meant to be a substitute for affirmative evidence. Rather, it is intended to aid the plaintiff in submitting his evidence, and to eliminate the necessity of positive evidence where a *valid* inference of fact lies. The medical profession is technical and its members spend long years of study to acquire the requisite knowledge and ability to allow them to practice medicine. With increasing uniformity, doctors are compelled to specialize in a particular field of medicine so that they may keep abreast with the diagnostic and scientific advancements constantly being made. To suggest that an ordinary lay-juror, by virtue of his infrequent appointments with his family doctor, can and has acquired a knowledgeable understanding of the practice of medicine is unreasonable and unrealistic. It must be recognized that juries are not composed of legally trained individuals who understand the intricacies of rules of law such as *res ipsa loquitur*. An instruction given by the trial court judge allowing the jury to find the defendant negligent on the strength of an inference has peculiar force and effect favorable to the plaintiff. Nor are juries composed of members of the medical profession who understand the position a doctor is in when treating a patient, and who are consequently apt to be less sympathetic towards an injured plaintiff. An unwarranted application of *res ipsa* gives rise to the danger of imposing a form of strict liability upon a physician when his patient experiences adverse results from his treatment.

**Conclusion**

The *Ferman* decision creates a judicial Pandora's box. If the permissible use of the doctrine is extended too far, the lid on the box will be opened and the evils of the rule will abound. However, as was true in mythology, this Pandora's box does provide one desirable feature; namely, *res ipsa loquitur* will permit an injured party to be compensated in those patently obvious situations that heretofore may have gone uncompensated due to the difficulties experienced in meeting the requisite degree of certainty of proof in establishing the cause of action, and due to the "conspiracy of silence."

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