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Medical Malpractice: Misuse of Res Ipsa Loquitur

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The doctrine of res ipsa loquitur is a familiar concept in tort law, but it is only recently that res ipsa loquitur has become involved in medical malpractice litigation. In this Article, Mr. O. C. Adamson, II, a member of the Minnesota Bar, examines closely the use of res ipsa in this restricted field. He examines the doctrine in light of its use in several leading decisions and concludes that that which the courts choose to call res ipsa loquitur is, in fact, an entirely new doctrine. The effect of this new doctrine, which the author terms "California res ipsa," is to place on the defendant doctor the burden of proving, once the injury is established, that he was free from medical malpractice. Mr. Adamson concludes that "California res ipsa" is, more often than not, a doctrine of liability without fault disguised as a rule of evidence.

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In recent years, medical malpractice litigation has greatly increased. This is particularly true in states such as California where the courts have adopted a doctrine (which they call res ipsa loquitur) which virtually requires the defendant physician to prove that he was not guilty of malpractice. The practical result of this doctrine is the imposition of absolute liability in many cases with the inevitable inhibition of the medical profession in the legitimate pursuit of its activities. Perhaps the time has come for a re-examination and re-evaluation of the problem in light of the experience of the last 30 years.

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 the layers of associations which the years

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have heaped upon res ipsa loquitur.[1] 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 definitive 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.[2]

Therefore, with no attempt to add to the thousands of words of controversy concerning res ipsa loquitur in general, the following discussion is limited to the effect of what some courts have called res ipsa loquitur in the specific field of medical malpractice litigation.

A convenient starting point is a case which really does not involve res ipsa loquitur (as it is generally understood) at all. In *Maki v. Murray Hosp.*,[3] a patient was hospitalized for treatment of a facial erysipelas. The patient proved that he entered the hospital and claimed that his next memory was awakening several days later with many broken bones and pains. The hospital offered evidence that he was provided with a full-time nurse; that, while delirious on occasion, he was never violent; that after being in the hospital several days, he saw a man (a painter painting the hallway) through the transom of his room and ran to the nurse in the adjoining bathroom exclaiming the man was about to shoot him; that the nurse attempted to calm him and place him in restraint; and that he brutally assaulted the nurse, snapped the restraint, and dived out a third-story window. Following the customary instructions, the jury returned a verdict for the hospital. The plaintiff claimed error because the trial court had refused to give a specific instruction on res ipsa loquitur. The appellate court agreed with the plaintiff declaring, with unusual partisanship, that there should be a remedy for every wrong and since the plaintiff was wronged, defendant's verdict should not stand.

Here, the law provides the plaintiff with a case on which he is enti-

1. PROSSER, TORTS § 42, at 201 (2d ed. 1955).

2. Since res ipsa loquitur is the offspring of miscegenation between evidence and negligence, it, like its kissing cousin, the presumption, is of 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.

3. 91 Mont. 251, 7 P.2d 228 (1932). For examples of the proper handling of this type of case, see Clements v. Swedish Hosp., 252 Minn. 1, 89 N.W.2d 162 (1958); Mesedahl v. St. Luke's Hosp. Ass'n, 194 Minn. 198, 259 N.W. 819 (1935). See also Mounds Park Hosp. v. Von Eye, 245 F.2d 756 (8th Cir. 1957).

tled to recover, unless the defendant explained away the *presumed* negligence.[4]

What further explanation defendant could have given is difficult to say.

Unfortunately, *Maki* was not permitted to be a maverick case—soon and well forgotten. Some 12 years later it was reborn with a vengeance on the west coast—

One day in 1939 it was discovered that Joe Ybarra had acute appendicitis. His attending physician, defendant Dr. *A*, made arrangements to have a surgeon, defendant Dr. *B*, operate on Joe at defendant Dr. *C*'s hospital. Joe went to the hospital, was given a hypodermic injection, and slept. Later he was awakened by defendants *B* and *C* and rolled to the operating room by a nurse believed to be defendant nurse *D*, an employee of *C*. Defendant Dr. *E* administered the anesthetic after positioning Joe on the operating table. The morning after the operation, Joe awoke in his hospital room attended by defendant nurse *F* and another nurse who was not named as a defendant. Joe developed a pain in, and later a partial paralysis of, his right shoulder. At the trial, Joe proved the above facts and offered expert testimony that his shoulder problem was due to a strain or pressure applied between his right shoulder and neck. Joe was non-suited and appealed.

In the resulting opinion, *Ybarra v. Spangard*,[5] the California Supreme Court relied heavily upon the *Maki* case, applied what it called the doctrine of res ipsa loquitur to the "facts," and held that Joe was entitled to go to the jury.

It is immediately apparent that many difficult questions existed:

(1) Was Joe's shoulder trouble of systemic or traumatic origin? In view of the expert opinion testimony offered by plaintiff to the effect that it was traumatic, the question probably would be for the jury.

(2) If traumatic, when did the trauma occur? The opinion is silent on this point. In the absence of evidence that the alleged trauma (*i.e.*, pressure or strain) occurred in the hospital, may a jury be permitted to speculate? Ordinarily, it is incumbent upon a plaintiff to show by a preponderance of evidence *when* his injury occurred if the time of the injury is material. The court failed to consider this question.

(3) If the injury was traumatic, and if it occurred in the hospital, was the injury the proximate result of someone's negligence?

4. Maki v. Murray Hosp., 91 Mont. 251, 266, 7 P.2d 228, 232 (1932). (Emphasis added.)

5. 25 Cal. 2d 486, 154 P.2d 687 (1944).

The court answered this question by stating that the injury was "obviously the result of someone's negligence" and that the requirement of the doctrine of res ipsa loquitur that the accident must be one which ordinarily does not occur unless someone was negligent, was "fully satisfied."[6] Is this true? Ordinarily, it is incumbent upon a plaintiff in a malpractice action to show that the treatment was unskillful[7] and that the unskillfulness was the proximate cause of the injury. And, ordinarily, lay jurors and judges are not competent to determine these questions without the aid of expert testimony. Can it be said, as a matter of undoubted common knowledge, that plaintiff's injury was caused by such substandard treatment? Or did the court also ignore this question by assuming that which was unproven?

(4) If the injury was traumatic and was caused by malpractice, who was responsible? Was defendant *A*, the attending physician, responsible? Apparently his diagnosis was correct and there seems to be little question that an attending physician, who refers his patient to a reputable hospital and surgeon, is *not* responsible for unskillful treatment rendered by such independent contractors.[8] Was defendant *B*, the surgeon, responsible? As the operating surgeon, he is liable not only for his malpractice, but is liable as well for the nurses and assistants who are *under his control* in the course of the surgery.[9] But did the alleged malpractice occur then, or did it occur before or after surgery? Was defendant *E*, the anesthetist (or anesthesiologist?), under the surgeon's control? Today, it is recognized that anesthesiologists are virtually autonomous and the surgeon is not responsible for the anesthesiologist's independent procedures.[10] Was the owner of the hospital, defendant *C*, responsible? He is vicariously liable for the torts of his employee-nurses except while they are under the sur-

6. *Id.* at 490, 154 P.2d at 689.

7. The Minnesota rule is that

> a physician and surgeon is not an insurer of a cure or good result of his treatment or operation. He is only required to possess the skill and learning possessed by the average member of his school of the profession in good standing in his locality, and to exercise that skill and learning with due care.

Yates v. Gamble, 198 Minn. 7, 268 N.W. 670 (1936). Apparently California followed the same formula. See Trindle v. Wheeler, 23 Cal. 2d 330, 143 P.2d 932 (1943).

8. See Rodgers v. Canfield, 272 Mich. 562, 262 N.W. 409 (1935); Smith v. Beard, 56 Wyo. 375, 110 P.2d 260 (1941).

9. *E.g.*, St. Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212 Minn. 558, 4 N.W.2d 637 (1942).

10. *E.g.*, Thompson v. Lillehei, 273 F.2d 376 (8th Cir. 1959), *affirming* 164 F. Supp. 716 (D. Minn. 1958); Huber v. Protestant Deaconess Hosp. Ass'n, 127 Ind. App. 565, 133 N.E.2d 864 (1956); see also Brossard v. Koop, 200 Minn. 410, 274 N.W. 241 (1937).

geon's control.[11] Are the nurses, defendants *D* and *F*, responsible? They, of course, would be liable only for their acts and are not vicariously liable for the acts of others.

The court recognized these problems and solved them by a vague reference to the "reason and spirit" of the doctrine of res ipsa loquitur and held:

> Where a plaintiff receives unusual [*sic*] injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might [sic] have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.[12]

What the court meant by "meet the inference of negligence" was, for the time being, left for conjecture.

The *Ybarra* case is a classic example of the old cliche that "hard cases make bad law" which really means that "bad cases make hard law." It is true that Joe Ybarra was in a difficult position. He had a disability and he, personally, apparently did not know how he acquired it. If he was "wronged," in the legal sense of the word, he was entitled to a remedy. He, and people like him, are natural objects of concern and sympathy. But it must be recognized that every harm is not a "wrong," and that "remedy" means a remedy against the wrongdoer, not against the blameless. The law, as uttered by the pens and via the predilections of appellate judges, is justifiably troubled with people like Joe. But it should be equally concerned with people like defendants *A, B, C, D, E* and *F*—most of whom logically must have been innocent of any wrongdoing[13] and most (if not all) of whom were as incapable as Joe of showing just how Joe was harmed. The conscience of the law is hardly salved by affording an innocent man a remedy against another innocent man. This is especially true in the context of the defendant's activity—the activity of trying to cure the physical ills of man within the limitation of man's admitted lack of omnipotence and omniscience.

How did the medical profession get itself into this difficulty? The reasons are probably numerous and diverse. Throughout the

11. *E.g.*, Moeller v. Hauser, 237 Minn. 368, 54 N.W.2d 639 (1952); St. Paul-Mercury Indemnity Co. v. St. Joseph's Hosp., 212 Minn. 558, 4 N.W.2d 637 (1942).

12. Ybarra v. Spangard, 25 Cal. 2d 486, 494, 154 P.2d 687, 691 (1944).

13. Defendant *A* would appear to be blameless. If *B* were personally guilty of malpractice, no one else would be. If a nurse were guilty before or after surgery, only she and *C* would be liable. If a nurse were guilty during surgery, only she and *B* would be liable. If *E* were guilty, probably only he would be liable. Unless *D* or *F* were personally responsible, neither could be liable.

last half century, the public has acquired an image of the prowess of the medical profession which is somewhat above its actual capacities. And this image was engendered, at least in part, by the airs and attitudes assumed by many medical practitioners. "Doctor *knows* best!" Today, the situation is hardly bettered by the continued emphasis in popular magazines and the sensational press, to say nothing of TV, of miraculous cures and miracle drugs. It is no wonder that the general public (some of whom sit on benches as well as on juries) find it hard to understand that a physician is fallible and that every failure to cure, *i.e.,* every bad result, is not evidence of malpractice. Added to this are the factors of the scarcity of medical facilities in certain areas, the refusal of physicians to make house calls, the relatively high cost of treatment, the apparent large income of physicians and surgeons (conveniently ignoring the costs of a medical education including long, impecunious years of college, internship and residency), and the occasional but never forgotten cavalier manner of some physicians. Finally, it must be added, there *is* occasional malpractice. But it is difficult to believe that anyone, no matter how prejudiced he may be, can really believe that the medical profession, as a profession, is actually an irresponsible, self-satisfied group of heedless charlatans or ghoulish butchers. Despite the over-dramatized and over-publicized activities of modern medicine, it should nevertheless be obvious that medicine, due to untiring and never-ending research, investigation, learning and practice, has made this world a much better place in which to live than it was 10, or 25, or especially 50 years ago.

It would seem to follow that a completely impartial law-giver, when faced with the dilemma of an innocent Joe Ybarra and equally innocent physicians and surgeons (as pointed out above, even if someone was guilty of malpractice in the *Ybarra* case, it is virtually impossible that more than one or two of the defendants would be liable therefor), the law-giver *must* decide that the greater harm will result to society by saddling innocent and blameless physicians and surgeons with liability without fault. To the extent that the medical profession is disturbed and distracted from its legitimate activities by the fear of baseless, burdensome and defamatory litigation, society is certainly penalized.

It would also seem that these views would be considered liberal (whatever that means) rather than conservative or reactionary. But that is not so. A goodly number of attorneys throughout this country take the ultra-conservative view of things and openly advocate the *Ybarra* doctrine claiming that it is better that the many suffer in order that one (their present or future client) may bene-

fit. In view of this philosophy, the expressed basis of the *Ybarra* case and its subsequent history must be examined.

As pointed out above, the California Supreme Court found (although no facts recited in the opinion support any such finding) that Joe was injured while under treatment and that his injuries were "obviously the result of someone's negligence."[14] Therefore, he was a wronged suitor in need of a remedy. The remedy was given the name of res ipsa loquitur. The label was false, for the real remedy was expressed by the court as follows:

> The control, *at one time or another,* of *one or more* of the various agencies or instrumentalities which might [*sic*] have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.[15]

This is not res ipsa loquitur. The element of exclusive control is lacking. Rather, this is a specialized rule of tort law pertinent only to the medical profession to the effect that

(a) if a patient claims that he sustained an injury in the course of medical treatment; and

(b) claims ignorance of how and by whom such injury was caused, then

(c) all who may have been in any way in control of the patient may be held liable unless each is able to convince the trier of fact that he was not guilty of malpractice which was the cause of the injury. The proof of the when, where, how, and by whom of the case is turned over to multiple, independently acting defendants.

In other words, the court announced an entirely new doctrine[16] that in surgery-hospital malpractice cases, any physician, surgeon or nurse who might conceivably be liable is liable "en masse" unless he or she can show freedom from malpractice. The court did a great disservice when it called this new and strange tort doctrine (which it obviously felt was justified by public policy) res ipsa loquitur. For the purposes of clarity herein, this doctrine is referred to as "California res ipsa."

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14. 25 Cal. 2d 486, 490, 154 P.2d 687, 689.

15. *Id.* at 492, 154 P.2d at 690. (Emphasis added.)

16. As Dean Prosser puts it:

> The basis of the [*Ybarra*] decision appears quite definitely to have been the special responsibility for the plaintiff's safety undertaken by everyone concerned; and again there is a deliberate policy, similar to that found in the carrier cases, which requires the defendants to explain or pay, and goes beyond any reasonable inference from the facts.

PROSSER, TORTS § 42, at 208 (2d ed. 1955).

The court gave several strong hints why it adopted this doctrine. First, it repeated the "heresy" of Dean Wigmore[17]:

> "[T]he particular force and justice of the rule, [of res ipsa loquitur] regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person."[18]

This rationalization has been repeatedly condemned by leading tort experts as being apocryphal.[19] Be that as it may, once a court approves such a rationalization it becomes the rule.

Following Wigmore's lead, the court went on to hold that all who may have caused plaintiff's injuries "may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."[20]

What did and does this mean? Wigmore's rationalization, while it may have had some basis when first written in 1905, is hardly pertinent today. In most jurisdictions, the plaintiff-patient, by means of depositions and interrogatories and the discovery of documents, can ascertain and produce "the chief evidence of the true cause." Such evidence is no longer "inaccessible" to the injured person. Indeed, one of the attorneys who strongly advocates California res ipsa recently bragged:

> However, after the tests were all made, depositions of every one of the doctors were taken, as provided by the California procedure. . . . These depositions were bound. Then I added the complete set of medical records from the hospital (subpoenaed duces tecum under the California procedure, and photostated). These records and testimony made a volume over six inches high. *Nothing further could be said at the trial.*[21]

Thus, the Wigmore rationalization today is an anachronism. The patient, though unconscious part of the time, may determine every fact prior to trial by discovery.[22]

The real reason for California res ipsa lies well hidden in the *Ybarra* opinion in the following remarks:

> Without the aid of the doctrine a patient . . . would be entirely un-

17. 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).
18. Ybarra v. Spangard, 25 Cal. 2d 486, 490, 154 P.2d 687, 689 (1944).
19. *E.g.*, PROSSER, TORTS § 42, at 209–10 (2d ed. 1955).
20. 25 Cal. 2d at 494, 154 P.2d at 691.
21. 3 BELLI, MODERN TRIALS 1998 (1954). (Emphasis added.)
22. In Frost v. Des Moines Still College of Osteopathy & Surgery, 248 Iowa 294, 79 N.W.2d 306 (1956), the court declared that plaintiff has no obligation to find out about her case by the use of discovery and may rely on res ipsa loquitur even though all the facts are available to her.

able to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.[23]

This judicial predilection has taken the form of an express judicial notice in later California cases. For example, in *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees,* the court said:

> 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 a given circumstance had been negligent. But gradually the courts awoke to the so-called "conspiracy of silence." No matter how lacking in skill or how 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 insure that the same results would not again occur at his hands. This fact, plus . . . [lack of knowledge on the part of the patient], forced 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.[24]

Thus it appears that one of the bases for California res ipsa is the difficulty which plaintiff-patients have in presenting expert opinion testimony that the defendant-physician's treatment was unskillful. This situation has been referred to as "The Conspiracy of Silence." Much has been written about this situation including a great deal of myth.[25] It should be noted that these writers seldom, if ever, point out that some patients cannot obtain expert opinion testimony simply because there is no malpractice—nor do they explain how, in view of the supposed conspiracy, so many malpractice cases are settled.

Be this as it may, the "silence" part of the catch-phrase refers to the proof that a particular act or omission is malpractice. As such, res ipsa loquitur is not the cure. The usual function of expert opinion testimony in a medical malpractice case is to determine (a) whether the particular act or omission of the defendant was negligent (*i.e.*, not in conformance with the standard of skill pre-

23. 25 Cal. 2d at 490, 154 P.2d at 689.
24. 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (Dist. Ct. App. 1957).
25. See Note, *Overcoming the "Conspiracy of Silence": Statutory and Common-Law Innovations,* 45 MINN. L. REV. 1019 (1961).

vailing in the community), and (b) whether such negligence is the cause of the patient's claimed damages.[26] Occasionally, expert testimony is necessary to create a fact question concerning whether the alleged negligent act occurred.

However, in some situations, the act or omission is proven and is so clearly malpractice that a jury of laymen can exercise their traditional function and find that the defendant was guilty of malpractice without expert help. Common examples of this type of case are the leaving of a sponge or other foreign object in the patient's body following surgery.[27] In these cases, the jury calls upon its common sense (just as it does in negligence cases generally) and determines whether the questioned act is so unskillful that it constitutes malpractice. These cases are not res ipsa loquitur cases. They are merely cases where the evidence presents such simple, uncomplicated questions that a lay jury possesses sufficient competence to make a decision without the aid of expert opinions. Also, in some situations, the damages are so obviously connected with and flow from the malpractice (as proved by expert evidence or otherwise) that a lay jury does not need the opinions of expert witnesses to decide the question of proximate causation.

In cases of this type, the act of malpractice (*e.g.*, failure to remove a sponge) is proven and since the act is obviously wrongful, some courts have glibly said that since the thing speaks for itself, this must be a res ipsa loquitur case. Dean Prosser apparently has fallen into the same error.[28] But the truth is that the proven act speaks for itself in the same way as any other patently negligent conduct. If the evidence showed that a defendant drove down a winding, hilly road at 70 m.p.h. in a blinding snowstorm, his con-

26. Occasionally causation is the most difficult phase of the patient's case. Generally, res ipsa loquitur assumes causation and if causation is not to be readily inferred from the other facts, res ipsa loquitur should not be applied. See Simon v. Larson, 210 Minn. 317, 298 N.W. 33 (1941); Williamson v. Andrews, 198 Minn. 349, 270 N.W. 6 (1936).

27. *E.g.*, Fowler v. Scheldrup, 166 Minn. 164, 207 N.W. 177 (1926) (metal suture clamp); Baer v. Chowning, 135 Minn. 453, 161 N.W. 144 (1917) (sponge). See also Moehlenbrock v. Parke, Davis & Co., 145 Minn. 100, 176 N.W. 169 (1920) (use of ether after knowledge of its unfitness); Moratzky v. Wirth, 67 Minn. 46, 69 N.W. 480 (1896) (failure to remove placenta following miscarriage). The Minnesota court occasionally had some difficulty with X-ray burn cases. The cases stand for the proposition that if the burn is acquired when X-ray is used for diagnostic purposes (*i.e.*, picture taking), expert testimony is not needed; but if the burn occurs as the result of an X-ray treatment, expert testimony is needed. *Compare* Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 136 N.W. 741 (1912), *and* Holt v. Ten Broeck, 134 Minn. 458, 159 N.W. 1073 (1916), *with* Hayes v. Lufkin, 147 Minn. 225, 179 N.W. 1007 (1920).

28. PROSSER, TORTS § 43, at 210–11 (2d ed. 1955). See Johnson v. Colp, 211 Minn. 245, 300 N.W. 791 (1941).

duct speaks for itself but the case is hardly one of res ipsa loquitur. After all, res ipsa loquitur is—and perhaps almost all will agree on this—a form of circumstantial evidence. And when all the circumstances are known, it has no place. The vice in cases of this type is that when some courts today are asked to adopt California res ipsa, they believe they are merely being asked to follow a precedent which they have previously established in the sponge-type cases.

The function of California res ipsa is to obviate the basic requirement that the plaintiff prove by direct or opinion evidence that a negligent act or omission occurred and that the injury resulted therefrom. California res ipsa is predicated on the theory that, under the facts of the case, the patient's injuries might be the result of some unknown malpractice. Whether the court or the jury is to decide the applicability of California res ipsa is not clear.[29] Once it is decided that California res ipsa is applicable, the plaintiff may go to the jury without evidence of any particular act or omission and without any expert evidence as to whether the unknown act or omission was malpractice, and without any expert evidence that the act or omission caused the injuries.[30] California res ipsa reasons backwards from an unintended and undesired result to the existence of malpractice. The injury itself is evidence of negligence. The result may be, and often is, liability without fault.

For example, in Joe Ybarra's second trial, each defendant testified at length concerning what he or she did and saw. They explained that none of them could identify any act or circumstance that could have traumatized Joe's shoulder. Joe obtained a judgment against *all* the defendants which was affirmed on appeal with this comment:

> It thus appears that reasoning from the circumstantial evidence the trial judge concluded that respondent suffered a traumatic injury during the unconsciousness of anesthesia and concluded therefore that, whether honest or not, appellants' [defendants'] testimony that they did not observe any incident which could have caused the injury did not establish that no such injury occurred.[31]

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29. See Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P.2d 170 (Dist. Ct. App. 1957).

30. As Belli puts it:

> But it should be realized that res ipsa here is, in effect, two-fold; substituting not only for proof, but for the necessary expert evidence, usually impossible to obtain . . . .

3 BELLI, MODERN TRIALS 1996 (1954).

31. Ybarra v. Spangard, 93 Cal. App. 2d 43, 46, 208 P.2d 445, 446 (Dist. Ct. App. 1949).

In other words, since each defendant was unable to prove conclusively that someone did not injure Joe, each was liable.[32]

California res ipsa reached its high-water mark (it is hoped!) in *Dierman v. Providence Hosp.*[33] where an explosion occurred during a nasal operation. The patient proved that she was burned while under anesthesia. The defendants proved that there were four possible causes of an explosion of this type—and that only two of such causes could possibly be the result of any malpractice on their part. The case was submitted with California res ipsa instructions and the jury understandably found for the defendants. A bare majority of the California Supreme Court reversed and ordered a new trial because defendants had not proved *the* cause and thus had failed to prove that they were not responsible for *the* cause. The dissent cogently points out the true effect of California res ipsa as thus applied:

> Under the doctrine of res ipsa loquitur, the majority opinion in effect imposes upon a defendant even more than the burden of proving that he was not negligent. It imposes the burden of proving the actual cause of the accident, for that is the only practical way under the opinion that defendants can show that they were free from fault. The imposition of such a burden necessarily involves the adoption of a rule on grounds of public policy that persons in attendance during an operation must explain not only their own conduct, but the conduct of any other person, such as a manufacturer of anesthetics, who might conceivably be responsible for the accident, as well as the forces of nature that brought it about. Such a rule would impose upon doctors, nurses, and members of hospital staffs absolute liability for unusual accidents that they cannot explain and might discourage their attending operations.[34]

And lest there be any doubt that California res ipsa is, more often than not, a doctrine of liability without fault disguised as a rule of evidence or proof, one of the leading exponents of California res ipsa had this to say:

> There is a wider use of res ipsa loquitur in California probably than in any other jurisdiction. It is used there in the multiple defendant cases for discovery as well as shifting the secondary burden of proof.

32. In Oldis v. La Societe Francaise de Bienfaisance Mutuelle, 130 Cal. App. 2d 461, 279 P.2d 184 (Dist. Ct. App. 1955), the *Ybarra* rule was used to hold liable no less than eight defendants (including the referring physician) of malpractice although logically only one or two or probably none were liable. Is this not reminiscent of the Nazi rule that, in the event a German occupation solider is killed, the first eight Frenchmen seized will be executed unless the guilty party reveals himself?

33. 31 Cal. 2d 290, 188 P.2d 12 (1947).

34. *Id.* at 299–300, 188 P.2d at 17.

> Sometimes with this shifting of proof, there is an imposition of a practical absolute liability.[35]

It is therefore important that California res ipsa be recognized for what it is: a declaration of public policy—garbed in the sheep's clothing of res ipsa loquitur—to the effect that, because medical men are too close-mouthed, a physician shall be treated like a common carrier and shall be liable for a bad result unless the jury may choose to exonerate him. Otherwise translated, this means that it is much better for society to err by damning blameless surgeons with the stigma of malpractice (and with all the attendant consequences to the medical profession) than to err by permitting one worthy plaintiff to go unrecompensed. If this policy is best for society, then, of course, it should be adopted by other courts. If, on the other hand, it is just one more example of the personal-injury field grinding its selfish ax, then it should be recognized for what it is and rejected.

The history of California res ipsa is checkered and little may be gained from following its vicissitudes.[36] Generally, it may be said that the situation is fluid and no one can predict what will happen in the future. In the upper Middle West, Iowa recently followed *Ybarra* in a multiple defendant situation.[37] In a recent Wisconsin case, in which the patient submitted expert testimony of malpractice and did not contend that res ipsa loquitur was applicable in any way, the learned justice ended his opinion with this cryptic gift:

> The plaintiff having made no request in the trial court for instruc-

35. BELLI, TRIAL AND TORT TRENDS, 1958 BELLI SEMINAR at lxiii (1959). Where Belli and his brethren are really headed may be gleaned from the following:

> Then, consider the case of where a patient has been advised of the remote danger of the drug or surgical procedure? Upon whom shall the risk of failure be placed? Certainly, if ever there is a field for the application and use of "insurance," it is here. Could it not first be limited to the cases where, as in *Ayers v. Parry* [192 F.2d 181 (3d Cir. 1951)], the court says that there is no fault on either party, in that "medical knowledge is not sufficiently advanced." Nevertheless, the patient has to live despite her condition. Insurance or compensation could here be paid without fault.

3 BELLI, MODERN TRIALS 1997 (1954).

36. *Compare* Costa v. Regents of the Univ. of Cal., 116 Cal. App. 2d 445, 254 P.2d 85 (Dist. Ct. App. 1953), *with* Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 570, 317 P.2d 170 (Dist. Ct. App. 1957).

37. Frost v. Des Moines Still College of Osteopathy & Surgery, 248 Iowa 294, 79 N.W.2d 306 (1956). *But see* Morgensen v. Hicks, 110 N.W. 2d 563 (Iowa 1961).

> tions as to the doctrine of *res ipsa loquitur* or its application in this case, it cannot be considered here.[38]

Michigan apparently still adheres to the rule that res ipsa loquitur is not applicable in malpractice cases.[39]

The situation in Minnesota is typical of that which exists in many states today. Generally, the Minnesota court has adhered to the rule that res ipsa loquitur does not apply in malpractice cases.[40] However, in 1961, the wind, without warning, apparently changed direction. The puzzling opinion in *Jensen v. Linner*[41] should cause the medical and legal professions of the state to pause and consider where we are now and where we are going. The opinion, some 8,000 words long, is not susceptible to a simple generalization. It will be necessary to wait for the next case or cases to determine the exact proposition upon which *Jensen* stands. It, like the *Ybarra* case, was a hard case. The patient was hospitalized for a hysterectomy—with a gratuitous appendectomy included—and the surgery was performed routinely. As the plaintiff was being removed from the operating room, a lesion was discovered on her ankle. There was no evidence of such a lesion before the operation. The plaintiff submitted her case on the precise theory that the lesion was a chemical burn caused by phenol (a caustic used to cauterize the stump of the appendix) and that defendants (the surgeon and the hospital) negligently permitted the phenol to come into contact with her skin. The Minnesota court, after considering the circumstantial evidence, held that there was a preponderance of evidence to support the plaintiff's theory that some one in the operating room spilled phenol on her ankle. Thus, the claimed negligent act was established. Having reached that point in its opinion, it would seem that the court would have been justified to follow the sponge-type cases and hold that the alleged act of malpractice was so simple that a lay jury could determine the issue without the aid of expert testimony, and, of course, with-

38. Ahola v. Sincock, 6 Wis. 2d 332, 349, 94 N.W.2d 566, 576–77 (1959). *But see* Keuhnemann v. Boyd, 193 Wis. 588, 214 N.W. 326 (1927).

39. Dunbar v. Adams, 283 Mich. 48, 276 N.W. 895 (1937); see also Lince v. Monson, 363 Mich. 135, 108 N.W. 845 (1961). *But see* Higdon v. Carlebach, 148 Mich. 363, 83 N.W.2d 296 (1957).

40. Wallstedt v. Swedish Hosp., 220 Minn. 274, 19 N.W.2d 426 (1945); Johnson v. Colp, 211 Minn. 245, 300 N.W. 791 (1941); Collings v. Northwestern Hosp., 202 Minn. 139, 277 N.W. 910 (1938); Yates v. Gamble, 198 Minn. 7, 268 N.W. 670 (1936); Quickstead v. Tavenner, 196 Minn. 125, 264 N.W. 436 (1936); Johnson v. Arndt, 186 Minn. 253, 243 N.W. 67 (1932); Staloch v. Holm, 100 Minn. 276, 111 N.W. 264 (1907); see Thompson v. Lillehei, 273 F.2d 376 (8th Cir. 1959), *affirming* 164 F. Supp. 716 (D. Minn. 1958).

41. 108 N.W.2d 705 (Minn. 1961).

out any res ipsa loquitur. Unfortunately, the court did not do that. Probably it was embarrassed by the fact that the trial judge gave a res ipsa loquitur instruction to the jury which was assigned as error. At any rate, the court referred to the sponge-type cases[42] and said, in effect, "see, we have applied res ipsa loquitur in the past" and thus the trial court's instructions, considered as a whole, are not erroneous in this type of case.

But the court did not stop there. It cited *Maki* and *Ybarra* and several other similar cases with this comment:

> We do not consider it necessary to discuss these cases though *we believe they are worthy of citation and support plaintiff's position herein.*[43]

CONCLUSION

A dilemma has always existed in tort law. No system of law can guarantee that all worthy suitors will be successful; nor can any system afford complete protection for the blameless defendant. The same dilemma exists in medical malpractice litigation. California (and the jurisdictions which follow its lead) did not solve the dilemma. California, as a matter of social philosophy, decided to weigh the scales heavily in favor of the plaintiff-patient. It determined that it is better to permit the imposition of liability without fault on a physician than to permit a deserving patient to go without a remedy. It achieved this result by the misuse of a Latin tag, res ipsa loquitur. Thus, it imported into malpractice litigation all the controversies and difficulties associated with that doctrine. The practical effect is that the physician must conclusively vindicate himself or suffer the consequences no matter how blameless he may be and no matter how impossible it may be for him to "explain." The jury, which is not unnaturally sympathetic to the plight of the plaintiff, is the final arbiter. The very real and cogent difficulties which face a professional man in the pursuit of a far from exact science such as medicine apparently are no longer of importance.

The question is: Where do we go from here?

42. Moratzky v. Wirth, 67 Minn. 46, 69 N.W. 480 (1896). The court also relied on an X-ray *diagnosis* case, Jones v. Tri-State Tel. & Tel. Co., 118 Minn. 217, 136 N.W. 741 (1912).

43. 108 N.W.2d at 718. (Emphasis added.)