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Application of Res Ipsa to Malpractice Suits

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RECENT CASES

APPLICATION OF RES IPSA TO MALPRACTICE SUITS

The defendant, doctor, had used a silver nitrate pencil to outline the veins in the plaintiff's legs in preparation for an operation for varicose veins. The silver nitrate burned the plaintiff's legs severely. The plaintiff brought a malpractice suit invoking the doctrine of res ipsa loquitur. The trial court granted a non-suit; plaintiff appealed. *Held,* that the doctrine of res ipsa loquitur applied and that the defendant's testimony that he followed the normal procedure was not sufficient to rebut the presumption of negligence. There was a strong dissent to the effect that res ipsa loquitur did not apply in cases where the question was one of expert opinion and of which the laymen did not have sufficient knowledge to determine. *Hurt v. Susnow,* 192 P. (2d) 771 (Cal. 1948).

It is generally held that in a malpractice suit wherein the plaintiff alleges an injury resulting from a negligent act or omission by a physician or surgeon, the plaintiff, as in any other action based on negligence, has the burden of proving that the doctor did not exercise reasonable care or skill.[1] A malpractice suit differs from an ordinary negligence action only in that the standard of care and skill required is that exercised by other physicians and surgeons in good standing in the same area.[2] Where the facts involved are not within the common knowledge of man, the plaintiff must establish and prove the lack of the requisite care and skill by expert testimony.[3]

The doctrine of res ipsa loquitur has been invoked in many malpractice situations[4] where the circumstances of the cases meet the conditions of the doctrine.[5] The main distinction upon which the courts allow or disallow application of the doctrine seems to be that if the act or omission were negligent within the common knowledge of man the doctrine will be applied and the courts will not apply it where expert testimony is required to prove the alleged negligence and the determination of the alleged negligence is not within the common knowledge of man.[6] Thus it has been applied in cases where a surgical sponge is left in the body

1. 41 Am. Jur. 235.
2. Wright v. Conway, 34 Wyo. 1, 241 Pac. 369 (1925); Engelking v. Carlson, 13 Cal. (2d) 216, 88 P. (2d) 695 (1939); 41 Am. Jur. 201.
3. McCoy v. Clegg, 36 Wyo. 473, 257 Pac. 484 (1927); William Simpson Const. Co. v. Industrial Accident Commission of Calif., 74 Cal. App. 239, 240 Pac. 58 (1925); Oftedal v. Calaway, 24 Cal. (2d) 81, 147 P. (2d) 604 (1943); Maryland Cas. Co. v. Industrial Acc. Commission, 64 Cal. App. (2d) 162, 148 P. (2d) 95 (1944).
4. See Note, 162 A. L. R. 1267.
5. Prosser enumerates the three conditions required for the application of the doctrine of res ipsa loquitur as "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, Torts 295 (1941).
6. Engelking v. Carlson, supra note 2; Ales v. Ryan, 8 Cal. (2d) 82, 64 P. (2d) 409 (1937); Alexander v. Hill, 174 Va. 248, 6 S. E. (2d) 661 (1940); Edwards v. Clark, 96 Utah 121, 83 P. (2d) 1021 (1938); 26 Va. L. Rev. 919, 925, n. 55; 40 Col. L. Rev. 161.

of a patient after an operation,[7] where patient was burned by x-ray machine,[8] where patient was burned from a hot water bottle while unconscious.[9] The courts refused to apply the doctrine in cases where there was injury from an injection of alcohol into a sciatic nerve,[10] where plaintiff incurred an infection in his leg resulting from a pressure sore from a cast,[11] where the fragments of a broken bone failed to mend correctly,[12] and where an explosion occurred while the surgeon, after anesthetizing the plaintiff, was cauterizing a nose wound with a hot electric needle.[13]

There is authority for the proposition that, in the absence of contrary evidence, there is a presumption in favor of the physician or surgeon that he exercised reasonable care and skill.[14] The Wyoming Supreme Court, relying in part upon this principle, has held that the doctrine of res ipsa loquitur did not apply in a case where the surgeon left a surgical towel in the body of a patient during a hernia operation.[15] It is submitted that such a presumption in favor of the physician or surgeon who is the defendant in a malpractice suit is meaningless. A presumption in favor of one party means only that the opposing party has the burden of proof of rebutting the presumption. The plaintiff already has this burden in the first instance.

Applying this state of the law to the noted case, it would appear that the dissent stands upon better ground. After establishing the requirements of control and lack of contribution on the part of the plaintiff, the majority of the court held that the requirement that the injury be such as would not ordinarily occur in absence of negligence was met; stating that, "certainly it cannot be contended that the severe burning of patients is the normal result of the preparatory treatment for surgery to remove varicose veins. If the solution was too strong defendant or someone was negligent."[16] However, as the dissent pointed out, it does not follow that if the injury is not the normal result of a certain treatment, it therefore does not ordinarily occur in absence of negligence. It may have been an unusual result from which no inference of negligence may be drawn. Also, the majority opinion did not invoke the distinction between an act that is negligent within the common knowledge of man and one which requires expert testimony to determine it as negligent. It is not within the common knowledge of laymen as to whether the application of the chemical, silver nitrate, to the skin will not cause an injury unless there is negligence on the part of someone.

The decision in the noted case may be justified on the basis of policy. One

7. Ales v. Ryan, supra note 6; Ault v. Hall, 119 Ohio St. 422, 164 N. E. 518, 60 A. L. R. 128 (1928); Davis v. Kerr, 239 Pa. 351, 86 Atl. 1007 (1913); Funk v. Borham, 204 Ind. 170, 183 N. E. 312 (1932). Contra: Rosson v. Hylton, 45 Wyo. 540, 22 P. (2d) 195 (1933).
8. Moore v. Steen, 102 Cal. App. 723, 283 Pac. 833 (1929). Contra: the majority of courts reject this view. See 41 Am. Jur. 237, and cases cited in n. 3.
9. Timbell v. Suburban Hospital, 4 Cal. (2d) 68, 47 P. (2d) 737 (1935).
10. Donahoo v. Lovas, 105 Cal. App. 705, 288 Pac. 698 (1930).
11. Nelson v. Nicollet Clinic, 201 Minn. 505, 276 N. W. 801 (1937).
12. McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870 (1912).
13. Dierman v. Providence Hosp., 188 P. (2d) 12 (Cal. 1948).
14. 41 Am. Jur. 236, 237 and n. 14; 26 Va. L. Rev. 924.
15. Rosson v. Hylton, 45 Wyo. 540, 22 P. (2d) 195 (1933).
16. 192 P. (2d) 770, 773.

of the reasons for the application of the doctrine of res ipsa is that the plaintiff is not in a position to know the facts constituting the negligence or causing the injury and the facts are not accessible to him.[17] This is especially true in malpractice cases since the patient generally submits himself to the treatment or operation having no knowledge of the medical and scientific effects and consequences. Also, it has been suggested by some courts that it is difficult for the plaintiff to persuade one member of the medical profession to testify against another.[18] These factors relate to the difficult burden cast upon the plaintiff in a malpractice suit. Thus it may be argued as a matter of policy that the courts would be justified in requiring the physician or surgeon to explain away a presumption or inference of negligence, in view of the fact that he has knowledge of the facts attending the injury and can more readily invoke the aid of expert testimony.

A contrary policy, and one which the courts have adopted generally, is that expressed by Justice Taft: "A physician is not a warrantor of cures. If the maxim, 'Res ipsa loquitur', were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to'."[19]

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PHYSICAL INJURY WITHOUT IMPACT

The new owner of an apartment house designated his two daughters manager and assistant-manager of the business. Three days later the plaintiff found her key would not open her apartment door as it had been bolted from the inside and she went to the office to complain. The assistant manager leaned against the door blocking the way while the owner and manager yelled and screamed at plaintiff that the O.P.A. could not run the apartment house and that they would select their own tenants. No bodily contact took place between the parties but plaintiff was not permitted to leave at will. The court found, upon ample evidence, that the conduct of defendants caused plaintiff to become frightened, and a proximate result thereof, to suffer an upset of her glandular condition, causing shortness of breath, nervousness, headaches, loss of sleep, and inability to carry on her normal activities. The plaintiff sought damages for loss of personal property and for personal injuries. The lower court allowed damages as prayed for. *Held,* that the defendants intentionally and unreasonably subjected the plaintiff to severe mental stress causing physical injuries as a proximate result thereof and for which

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17. Ybarra v. Spangard, 25 Cal. (2d) 486, 154 P. (2d) 687, 162 A. L. R. 1258 (1944).
18. Christie v. Callahan, 124 F. (2d) 825 (App. D. C. 1941); Simon v. Freidrich, 163 Misc. 112, 296 N. Y. S. 367 (N. Y. City Ct. 1937); Coleman v. McCarthy, 53 R. I. 266, 165 Atl. 900 (1933); Johnson v. Winston, 68 Neb. 425, 94 N. W. 607 (1903); Reynolds v. Struble, 128 Cal. App. 716, 18 P. (2d) 690 (1933).
19. Ewing v. Goode, 78 Fed. 442, 443 (C. C. S. D. Ohio 1897).