Res Ipsa Loquitur—Its Future in Medical Malpractice Cases†

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A PATIENT submits to a major operation under general anesthesia. Unless he is an unusual person in his education or understanding, he is ignorant of the basic techniques and routine of the operation, including those which pertain to administration of the anesthesia. Often his ignorance extends even to the theory and purpose of the operation. He necessarily places his confidence in his physician, surgeon, anesthetist, and the other attendants who participate by the express or implied leave of the hospital where the operation is performed. He is entirely passive during the process, at least so far as volitional conduct is concerned. He knowingly does no act. He knows nothing by direct perception from shortly after the moment anesthesia is administered until he regains consciousness, usually away from the place of the operation, in a recovery room or his own hospital room. No such principle as lack of vigilance or diligence, properly invoked in some other areas of the law, could logically or equitably operate to penalize him for not knowing more about the transaction involved.

Such a person during the period of unconsciousness sustains an injury to a portion of the body not involved in the operation, and not previously ill, diseased or disabled. He is at a loss to know what happened or how it happened. Can it rationally be doubted that those who had him in their charge morally owe him the duty to try to explain what took place? Even casual observers of events affecting an unconscious person would normally feel obliged in good conscience to state observations which the afflicted person had a need to know. The patient-physician relationship historically and actually has been and is one of trust and confidence of the patient in the physician. The legitimacy and normality of dependence of the patient

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† This Article is in substance a chapter from Professor Louisell's and Dr. Williams' forthcoming book, *Trial of Medical Malpractice Cases*, which will be published later this year by Matthew Bender & Co. The present discussion is preceded, in the book, by a comprehensive treatment of the present status of *res ipsa loquitur* in medical malpractice cases. The authors there discuss the various policies involved in giving the doctrine a broad or narrow scope, or in refusing to apply it at all, and attempt an outline of the procedural and substantive ramifications of the doctrine.

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on his physician, like that of the client on his lawyer, inheres in the very notion of a profession. This rightly includes dependence for communication as well as for conduct. It seems clear that the physician has the moral duty to explain, as best he can, what took place. It is no answer to say that the ordinary man cannot reasonably be expected to make a case against himself. The professional man is no ordinary man; he is no bargainer in the open market when dealing with a client or patient and even less an adversary to him. When self-interest conflicts with professional duty, the path of obligation is clearly prescribed by the definition of a profession.¹ For the physician, this is made explicit in his own code of medical ethics:

The principal objective of the medical profession is to render service to humanity with full respect for the dignity of man. Physicians should merit the confidence of patients entrusted to their care, rendering to each a full measure of service and devotion.²

It would be strange if judicial administration showed no tendency to recognize the moralities summarized above. That the doctrine of *res ipsa loquitur* has been sometimes seized upon as a feasible tool with which to harmonize the law with morals is not surprising. The gross inconsistency in its application, however, is surprising. The student of malpractice litigation can hardly fail to be impressed by the discrepancy in the results often

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¹ It must be conceded that, in the exceptional malpractice case, the point may be reached where the physician's duty to disclose gives way to his right not to incriminate himself in the constitutional sense (*i.e.*, the right not to furnish information that may be grounds for a criminal prosecution). Such cases are exceptional indeed in relation to the total number of malpractice cases, involving only civil liability at most and where the possibility of a criminal charge is remote to the degree of being fanciful. It should also be acknowledged that the extent of the physician's duty to communicate, varies with the facts and needs of the particular case. Thus, the obligation to reveal a deficiency of a medical procedure is obviously stronger where by revelation the deficiency might be corrected (as where the doctor informs the patient that an object was left in his body, for which he should be X-rayed) than where the doctor in good faith believes that the deficiency, however unfortunate, is now irremediable. In the first instance, the obligation to communicate is directly pertinent to continuing treatment; in the latter, presumably it is not, although even there one may contend that the physician, however honest his own judgment about the hopelessness of remedying the deficiency, should not by withholding information foreclose the patient from attempts to seek others' judgment and assistance. Also, in general, the obligation of responding to inquiry, is a stronger one than that of volunteering information. The point is that full communication according to the needs of the patient should be the norm, not self-protection of the professional man. It seems obvious that judicial recognition of the physician's duty to communicate, of the kind for which we contend, involves nothing akin to crude "third degree" psychology. The law would not stand over him with a club, commanding him to talk. The law would simply say, in appropriate cases, that he must communicate under sanction of being regarded as responsible. Clearly, an adequate communication in a given case may be, that the subject matter still is not susceptible of medical explanation.

² AMERICAN MEDICAL ASS'N, PRINCIPLES OF MEDICAL ETHICS § 1 (1957). *Cf.* AMERICAN BAR ASS'N, CANONS OF PROFESSIONAL ETHICS Canon 11 (1958) which reads, in part: "The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client." See also *id.* Canons 15, 37.

reached in cases apparently substantially similar on their facts depending on whether *res ipsa loquitur* is or is not applied. Thus, if the patient in the hypothetical case set out in the preceding paragraphs brings suit in California, under *Ybarra v. Spangard*³ he will be entitled legally to the explanation which we have concluded he is entitled to morally, the obligation to make such explanation inhering in the physician-patient relationship: *res ipsa loquitur* will be applied. But if he sues in Kansas, under *Rhodes v. De Haan*,⁴ *res ipsa loquitur* will not be applied, and plaintiff in all likelihood will go unrequited however egregious the negligence that has injured him.⁵

Obviously both *Ybarra v. Spangard* and *Rhodes v. De Haan* cannot be right; a choice must be made. Putting to one side for the moment the problem as to the best way to effectuate legally the moral obligation of the physician fully to communicate with his patient, we submit that a rational legal order presupposes some suitable device to compel the professional man to disclose the facts needed by his patient or client to comprehend an occurrence or transaction arising in the professional relationship. In modern procedure many jurisdictions have gone far in compelling litigants generally to reveal relevant facts by making available efficient discovery devices.⁶ It is perhaps arguable that an ideal system of discovery would guarantee availability of the facts, to the extent known or determinable by an interested party, and would substantially reduce if not obviate the need for the doctrine of *res ipsa loquitur*. But, in practice, even the liberal discovery

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³ 25 Cal. 2d 486, 154 P.2d 687 (1944), 162 A.L.R. 1258 (1946). In this case, plaintiff alleged traumatic injury in the region of his shoulder while under anesthesia for an appendectomy. He testified that he was placed on the operating table, so that he was pulled up against two hard objects at the top of his shoulder about an inch below his neck. He awoke with a pain in his shoulder that later progressed down his arm and was accompanied by wasting (atrophy) of muscles about the shoulder. There was expert evidence that the injury was traumatic in origin. All defendants—the surgeon, attending physician, anesthesiologist, nurse and hospital owner—obtained judgments of nonsuit in the trial court. The Supreme Court of California reversed on the ground that *res ipsa loquitur* applied against all defendants. After a second trial before the court, plaintiff had judgment, which was affirmed on appeal. *Ybarra v. Spangard*, 93 Cal. App. 2d 43, 208 P.2d 445 (1949).

⁴ 184 Kan. 473, 337 P.2d 1043 (1959). In this case, plaintiff's petition alleged that he submitted to an operation for a duodenal ulcer; that upon entering the operating room he was immediately administered a general anesthetic and was completely unconscious until he awoke in a hospital room. Plaintiff further alleged that he had no pain or disability whatsoever in the region of his arms and hands and had been employed regularly; but that upon regaining consciousness he suffered intense and disabling pain in his right arm and shoulder and that part of his disability was permanent. A demurrer to the petition was sustained on appeal, explicitly rejecting *res ipsa loquitur*.

⁵ This is particularly true where, as is apparently the case in Kansas, the procedural system lacks adequate discovery devices. See Slough, *Trial Preparation under Kansas and Federal Rules: A Contrast*, 4 KAN. L. REV. 58 (1955).

⁶ E.g., FED. R. CIV. P. 26-37; CAL. CODE CIV. PROC. §§ 2016-35. See generally 4 MOORE, FEDERAL PRACTICE ¶¶ 26-37 (2d ed. 1950); Louisell, *Discovery Today*, 45 CALIF. L. REV. 486 (1957).

provisions of the Federal Rules of Civil Procedure⁷ and of the California Code of Civil Procedure⁸ are gauged primarily to compel disclosure after commencement of action; the victim of an injury who was unconscious during an operation may not, in the absence of *res ipsa loquitur*, have enough information to frame a complaint.⁹ Further, discovery can be expensive, and should not be made to do the work that can more economically and logically be accomplished by proper placement of the original or basic burden of disclosing facts.¹⁰

But to acknowledge the moral obligation of the physician to disclose to his patient the pertinent facts of the professional relationship, and to recognize that from the viewpoint of procedural history if not of pure logic *res ipsa loquitur* is a feasible tool to give legal sanction to the moral obligation, is only to introduce the problem, not to solve it. Should the doctrine (1) merely permit but not require an inference of negligence, (2) create a presumption of negligence, requiring a conclusion in accord therewith in the absence of adequate explanation, or (3) actually shift the true burden of proof or persuasion on the issue of negligence to defendant?¹¹ The great confusion in courts' efforts to answer this question, and the profound disagreement among able scholars who have given it careful attention, must

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⁷ FED. R. CIV. P. 26-37.

⁸ CAL. CODE CIV. PROC. §§ 2016-35.

⁹ Generally, petitioner for perpetuation of testimony is required to show that he "expects to be a party to an action . . . but is presently unable to bring it or cause it to be brought . . ." FED. R. CIV. P. 27; CAL. CODE CIV. PROC. § 2017(a)(1); see 4 MOORE, FEDERAL PRACTICE § 27.07[2] (2d ed. 1950); Louisell, *supra* note 6, at 492 n.31. But see the possibility under New York practice for examination before trial in order to frame a complaint. Application of Weiss, 208 Misc. 1010, 147 N.Y.S.2d 455 (Sup. Ct. 1955); N.Y. CIV. PRAC. ACT §§ 295-96. See also Weinstein & Bergman, *New York Procedures to Obtain Information in Civil Litigation*, 32 N.Y.U. L. REV. 1066 (1957). It is possible, depending on the liberality of the court in applying Federal Civil Rule 8(a), that a general complaint adequate to withstand a motion to dismiss could be filed in a federal court consistently with the good faith requirement, FED. R. CIV. P. 11, with the expectation of amending the complaint as information obtained by discovery reveals more fully the facts involved. FED. R. CIV. P. 15. See 2 MOORE, *op. cit. supra*, §§ 8.12-14. In California, in some cases, the rigor of the plaintiff's position may be mitigated by the unusual "John Doe" practice, whereby defendants in addition to those already identified are fictitiously named in the original complaint. CAL. CODE CIV. PROC. §§ 405-06, 474, 581a; 1 WITKIN, CALIFORNIA PROCEDURE 812 (1954); 2 *id.* at 1210-16, 1700.

¹⁰ See Jaffe, *Res Ipsa Loquitur Vindicated*, 1 BUFFALO L. REV. 1, 14 (1951).

¹¹ See generally, 9 WIGMORE, EVIDENCE §§ 2485-93 (3d ed. 1940); MCCORMICK, EVIDENCE 635-86 (1954); 5 MOORE, *op. cit. supra* note 9, § 43.08; 6 *id.* § 56.11; Falknor, *Notes on Presumptions*, 15 WASH. L. REV. 71 (1940); Helman, *Presumptions*, 22 CAN. B. REV. 118 (1944); McBaine, *Presumptions: Are They Evidence?*, 26 CALIF. L. REV. 519 (1938); Morgan, *Further Observations on Presumptions*, 16 SO. CALIF. L. REV. 245 (1943); Morgan, *Presumptions*, 12 WASH. L. REV. 255 (1937); Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906 (1931). See also LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES § 14.05 (1960).

attest either to its intrinsic difficulty or its involvement with disparate social value judgments that defy a consensus, or both.¹²

We think, however, that lawyers, judges and scholars will generally agree—in fact, that it is demonstrable—that acceptance of the viewpoint that the doctrine actually shifts the burden of proof to defendant, would substantially simplify judicial administration of the doctrine. Therefore there is much to be said for that viewpoint, and we would favor its adoption, if it is not intrinsically or practically unfair, or too discrepant with norms that customarily regulate placement of the burden of proof in our society. Thus we first turn to a demonstration of the possibility of simplifying judicial administration of the doctrine of *res ipsa loquitur*. Then we inquire as to whether placement of the burden of proof on defendant on the issue of negligence, where the doctrine is applicable, would be unjust or do violence to the basic rules of judicial administration of our society.

I

NEED FOR SIMPLIFICATION OF RES IPSA LOQUITUR

Professors Harper and James have concluded that the battle of the experts¹³ as to the legitimate procedural effects of *res ipsa loquitur* seems to be a "tempest in a teapot"; that the significant thing about the doctrine is that it enables plaintiff to get to the jury; and that it makes little difference which of the three possible viewpoints, specified in the preceding section, be applied provided it be applied consistently and without confusion.¹⁴ They expressly acknowledge, however, that the danger of reversal on appeal may be considerable where the decisions in a jurisdiction are in confusion. It seems to us that confusion in the administration of *res ipsa loquitur* is more the rule than the exception, and that much of the confusion inheres in the difficulty of explaining to a jury the significance of an inference or a presumption, and the varying processes by which either of them may be undermined or rebutted by evidence. Indeed, it sometimes seems unfair and inaccurate impliedly to criticize juries in this connection, when judicial opinions evidence the most grievous confusion in their discussion of *res ipsa loquitur's* relation to inference, presumption, burden of going forward with the evidence, and burden of proof.

¹² We refer to attention given generally to the problem of the procedural effects of *res ipsa*. See, e.g., 2 HARPER & JAMES, TORTS § 19.11 (1956) [hereinafter, HARPER & JAMES]; PROSSER, TORTS 211-17 (2d ed. 1955) [hereinafter, PROSSER].

¹³ See, e.g., Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519 (1934); Prosser, *The Procedural Effect of Res Ipsa Loquitur*, 20 MINN. L. REV. 241 (1936); Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 SO. CAL. L. REV. 166 (1937); Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 SO. CAL. L. REV. 459 (1937); Carpenter, *Res Ipsa Loquitur: A Rejoinder to Professor Prosser*, 10 SO. CAL. L. REV. 467 (1937); Jaffe, *supra* note 10.

¹⁴ 2 HARPER & JAMES § 19.11, at 1104.

The recent case of *Weiss v. Axler*,¹⁵ although not a medical malpractice action, is instructive in this connection. There plaintiff lost her hair following a permanent wave treatment in defendant's beauty salon. She claimed the operator either had used too strong a wave solution or had allowed it to remain in the hair too long. The trial court instructed the jury on *res ipsa loquitur*, and they found for plaintiff. The Supreme Court of Colorado affirmed the judgment for plaintiff. Frantz, J., in a scholarly opinion undertook for the court a comprehensive survey of the history of the doctrine in Colorado, noting the serious confusion which had confounded it:

The maze of decisions in this state regarding the doctrine of *res ipsa loquitur* results in "confusion worse confounded." Truly, our appellate courts have cumbered the doctrine with loose, inaccurate and contradictory statements to the point that a pruning job becomes imperative so that the doctrine will assume a precise and symmetrical form.¹⁶

In reviewing numerous previous *res ipsa* cases, he pointed out:

Over the years three irreconcilable results have developed in the application of the maxim of *res ipsa loquitur* by the appellate courts of this state. In a substantial majority of the cases in which the courts have said *res ipsa loquitur*, the courts have held that the burden shifts to the defendant to overcome the presumption of negligence by an explanation showing the defendant not to have been guilty of negligence. In other cases the application merely shifts to the defendant the burden of going forward with evidence indicating the absence of negligence on his part. And still other cases hold that the presumption is evidence, to be weighed as such against the evidence of defendant in explanation of the occurrence, upon which the jury might find for the plaintiff, and the court, presuming such contingent result, is obligated to submit the case to the jury for determination.¹⁷

The learned justice concluded:

Out of this welter of confusing and chaotic commentaries selected from our decisions there is much that is compatible with the historic concept of the principle of *res ipsa loquitur*. It is the departure from this concept that has misshaped the doctrine and made its application uncertain. Paradoxically we must move backward, i.e., return to the doctrine's earliest meaning and utility, in order to give it efficacy and meaning in the present highly mechanized, scientific and industrialized era.

. . . . .
Bearing in mind the historical evolution of the maxim, we hold that the determination that the presumption of negligence arises from a set of circumstances involves the exercise of a judicial function; a situation is presented in the trial of a cause from which the court in effect determines that the experience and knowledge of mankind enjoin upon it the probability of

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¹⁵ 137 Colo. 544, 328 P.2d 88 (1958), carefully discussed in Carrigan, *Medical Malpractice in Colorado*, 36 DICTA 339, 356 (1959).

¹⁶ 137 Colo. at 548, 328 P.2d at 91.

¹⁷ *Id.* at 549, 328 P.2d at 91, 92.

defendant's negligence under the circumstances presented. The court resolves that the occurrence, unexplained, indicates negligence and establishes a prima facie case against the defendant.

Such resolution is a judicial function; and since the court decides as a matter of law the existence of probable negligence making a prima facie case, the presumption truly is one of law. Hence, to speak of "inferring negligence" in a *res ipsa loquitur* case is to misuse the term. Inferring is a fact-finding function, whether trial is to court or jury, and involves the discretion of the trier of the facts whether to accept or reject the inference. Not so as to the presumption of negligence in a case where *res ipsa loquitur* is applicable; there it is conclusive as a matter of law unless the evidence given in explanation by the defendant destroys the presumption . . .

The doctrine of *res ipsa loquitur* creates a compulsive presumption of negligence which continues to exist until the defendant has satisfied the court or jury, whichever is to find the fact, by a preponderance of the evidence that he was not negligent. If he has thus satisfied the trier of the facts, he has destroyed the presumption. Thus, the sole question in a *res ipsa loquitur* case is: has the defendant overcome the prima facie case of negligence against him by establishing by evidence satisfactory to the jury that he was not negligent?

In determining the sole question in a *res ipsa loquitur* case, it is the province of the jury generally to consider the explanation factually and from the standpoint of credibility of the witnesses. An explanation may be complete, but the witnesses making it not worthy of credit, in which event the force of the presumption remains intact. And the application of the doctrine is not removed where the explanation is obtained by calling the defendant as an adverse party for questioning by leading questions under the rule, or by taking his deposition.

The defendant's explanation does not per se destroy the presumption; the conviction of the jury (or the court in a trial to it) that the explanation exonerates the defendant dissipates the presumption.¹⁸

It will be noted that the court in effect concluded, therefore, that *res ipsa loquitur* shifts the burden of proof to defendant and requires a finding for the plaintiff unless the defendant satisfies the jury by a preponderance of the evidence that he was not negligent. As we later develop, it is our own conclusion that, on balance, this is the best solution to the problem of the procedural significance of the doctrine. We therefore mean no disparagement of the opinion's conclusion when we point out that, to reach it, the learned justice invoked all of the following concepts: "prima facie case," "presumption," "compulsive presumption," "presumption of law," "probable negligence" and "preponderance of the evidence;" and he had to negative applicability of "inference." Yet despite his thorough and comprehensive survey he apparently overlooked, perhaps because of the inherent complexity presented by so many interacting concepts, that his opinion has one most anomalous feature. For while it abides by the historic notion that it is

¹⁸ Weiss v. Axler, 137 Colo. 544, 556-60, 328 P.2d 88, 95-97 (1958).

the jury's function to decide whether defendant's explanation overcomes the "compulsive presumption" inherent in *res ipsa*, it makes application of the doctrine in the first place a matter for the court, thus taking from the jury the issue of credibility of plaintiff's witnesses. And it was precisely because that issue was taken from the jury that *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*¹⁹ was reversed.

Indeed, perhaps recourse to the *Salgo* case will best make clear the reasons for the strength of our conviction, that simplicity in expressing the concept of *res ipsa loquitur* is a dire need in tort litigation and specifically in malpractice cases today. In that case plaintiff submitted to a complicated X-ray procedure, a translumbar aortography, aimed at pin-pointing the major trouble in his condition of painful disability of the legs. Following the aortography, he suffered a permanent paralysis of the lower half of his body. In his malpractice action against his physician and the hospital, plaintiff invoked *res ipsa loquitur*, claiming the paralysis resulted from the fact that the needle used to inject Urokon²⁰ had been inserted in the wrong place. The trial court gave the following lengthy instruction on *res ipsa loquitur*:

You are instructed that the general rule of law is that the mere happening of the accident, of and by itself, as set forth in plaintiff's complaint, or the mere fact that plaintiff brought this action of and by itself or that plaintiff suffered injuries of and by itself, do not of itself or themselves raise any presumption or inference against any of the defendants.

From the happening of all the events involved in this case, however, as established by the evidence, there arises an inference that the proximate cause of the occurrence or accident was some negligent conduct on the part of the defendants. This inference is brought about by what is known in law as the *res ipsa loquitur* doctrine. That inference is, however, a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it will support a verdict for plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendants to rebut the inference by showing that it or he did, in fact, exercise the care and diligence required of them, or that the occurrence or accident occurred without being caused by any failure of duty on their part.

In making such a showing, it is not necessary for the defendants to overcome the inference by a preponderance of the evidence. Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendants liable, the inference of negligence must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendants. If such a preponderance in plaintiff's favor exists,

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¹⁹ 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

²⁰ Urokon is an organic iodine compound in solution commonly used in various X-ray techniques. In the *Salgo* case it was used to facilitate visualization of the aorta by X-ray.

then it must be found that some negligent conduct on the part of the defendants was a proximate cause of the injury; but if it does not exist, if the evidence preponderates in defendants' favor, or if in the jury's mind there is an even balance as between the weight of the inference and the weight of the contrary explanation, neither having the more convincing force, then your verdict must be for the defendants.

This instruction may appear to constitute an exception to the general rule that the mere happening of an accident, or the mere fact that plaintiff suffered injuries, or the mere fact that plaintiff brought this action, does not support an inference of negligence. This instruction, however, is based on a special doctrine of law which is to be applied under the evidence in this case.

I want to change one instruction there. I want you to bear in mind that this particular instruction is on the *res ipsa loquitur* doctrine, and does not necessarily mean that there could not be a verdict in favor of the defendant upon other theories; and that this particular instruction refers only to the *res ipsa loquitur* doctrine; and if you find that the evidence preponderates in favor of the defendants over the inference, then you would not be entitled to return a verdict in favor of plaintiff based solely upon the *res ipsa loquitur* doctrine.²¹

But the judgment for plaintiff after a lengthy and costly trial was reversed because "the jury were not told that . . . [*res ipsa loquitur*] could apply only in the event they found that the needle had been inserted in the wrong place. On the contrary, the court instructed the jury that as a matter of law . . . the inference of negligence arose. The jury was given no opportunity to determine the facts upon which the doctrine would or would not arise."²²

Obviously it is a difficult task for the judge to formulate, and a herculean one for the jury to follow, an instruction that states with precision adequate to withstand attack on appeal, all of the complex notions necessary to inform the jury that they must first determine whether *res ipsa* is applicable and, if so, give it the effect of an inference, or presumption, and then decide whether the inference, or presumption, is undermined or negated.²³

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²¹ Brief for Appellants, App., pp. 16-17, *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

²² *Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, *supra* note 20, at 572, 317 P.2d at 177, 178.

²³ Despite all of the attention given to *res ipsa loquitur* by the California courts, see, e.g., WITKIN, CALIFORNIA EVIDENCE 96-118 (1958), and all of the expensive reversals, it is still impossible authoritatively to state whether in California today the doctrine creates an inference, or a presumption, of negligence. Compare the following cases: *Leonard v. Watsonville Community Hosp.*, 47 Cal. 2d 509, 305 P.2d 36 (1956); *Burr v. Sherwin Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954); *Zentz v. Coca Cola Bottling Co.*, 39 Cal. 2d 436, 247 P.2d 334 (1952). See PROSSER 213 n.3, where that learned author confesses: "California's position remains incomprehensible to the writer." We believe that persistence of this confusion indicates an undue and unnecessary complexity which inheres in the concepts of "inference" and "presumption" in relation to the larger problems of "going forward with the evidence" and "burden of proof." The charge, sometimes made in medical circles, that California irrationally and indiscriminately

In contrast to the complex instruction necessary on *res ipsa loquitur* where it is held only to create an inference of negligence—which despite its detail was yet inadequate in the *Salgo* case—is the simple instruction possible in jurisdictions where the doctrine is held to transfer the burden of proof to defendant. Thus, in the Alabama case of *Sellers v. Noah*,²⁴ where plaintiff claimed that defendant surgeon left a needle during an appendectomy, the court's instruction on *res ipsa loquitur*, affirmed on appeal, was simply:

The court charges the jury that, if you are reasonably satisfied from the evidence that the defendant . . . [performed an appendectomy on plaintiff] and that in the performance of said operation he left a part of the needle in the body of plaintiff, then the law casts upon the defendant the burden of showing that he used such reasonable and ordinary skill, care and diligence, as physicians and surgeons in the same general neighborhood and in the same general line of practice ordinarily used and exercised in such operations.²⁵

Similarly in Louisiana, where *res ipsa* shifts the burden of proof, the doctrine's essence understandably and simply can be conveyed in the few words used in *Jones v. Shell Petroleum Corp.*:²⁶

[W]hen the thing which produced the injury is under the control of the defendant or his servants and the injury would not have occurred unless negligence had been present in some form and the facts causing the injury are peculiarly within the knowledge of defendant and not equally accessible to plaintiff, the burden is on the defendant to explain the cause of the accident, if he desires to escape from the inference of negligence.²⁷

II

OBJECTIONS TO SHIFTING THE BURDEN OF PROOF

We think it can be shown, as we have undertaken to do, that practical administration of *res ipsa loquitur* would be facilitated, and costly reversals

applies *res ipsa* in medical malpractice cases seems rash to us. See, e.g., *Carr v. Dickey*, 163 Cal. App. 2d 416, 329 P.2d 539 (1958), where it was held that, in an action for alleged negligence of a dentist in extracting a sound tooth rather than the diseased one, the fact that the tooth allowed to remain in plaintiff's jaw was subsequently removed by another dentist after pain continued did not justify application of *res ipsa loquitur*. For an objective appraisal of California's attitude on *res ipsa* in malpractice, see McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 550, 624-28 (1959), in *PROFESSIONAL NEGLIGENCE* 13, 87-93 (Roady & Anderson ed. 1960).

²⁴ 209 Ala. 103, 95 So. 167 (1923).

²⁵ *Id.* at 105, 95 So. at 168.

²⁶ 185 La. 1067, 171 So. 447 (1936). This was not a malpractice case. For a recent Louisiana nonjury malpractice case, see *Andrepoint v. Ochsner*, 84 So.2d 63 (La. App. 1955). The burden of proof was on defendants. The physician attendant adequately explained the situation so as to show he had not been negligent; but the hospital's explanation did not exculpate it. The case is an excellent demonstration of the rationality of placing the burden of proof on defendant.

²⁷ *Jones v. Shell Petroleum Co.*, *supra* note 26, at 1071, 171 So. at 449.

to some extent diminished, if the doctrine were candidly recognized to shift the burden of proof on the issue of negligence to defendant. However, if such a shift is wrong from the viewpoint of equity and justice, or discordant with the fundamental philosophy of our system of judicial administration, or would rightly be resented by the medical profession as arbitrary or invidiously discriminatory, it could not be justified merely on pragmatic grounds of convenience. We therefore feel it incumbent to examine into possible objections in principle to placing the burden of proof on defendant in malpractice *res ipsa* cases.

Probably the most cogent objections from this viewpoint could be summarized as follows:

(1) To place the burden of proof on defendant to exculpate himself from negligence, when the plaintiff's charge thereof requires no more than filing of a complaint, goes against our basic theory of judicial administration and is fundamentally unfair. The plaintiff generally has the burden of proof for the good reason that, as a matter of elemental fairness, he who would disturb the status quo must justify his legal aggression.

(2) Whatever justification there may be for departing from the usual norm by placing the burden of proof as to negligence on the defendant, must rest on policy considerations which are essentially independent of *res ipsa loquitur*. That Latin term is simply the label for a variety of circumstantial evidence. It perverts the doctrine to make it a tool to achieve a policy goal unrelated to circumstantial proof.

(3) "*Res ipsa loquitur* is applied to a wide variety of cases, differing materially in their facts, and each case is a problem in itself."²⁸ To allow the doctrine to shift the burden of proof, even if justified in some cases, would not be generally sustainable.

We now address ourselves to these objections in order.

A. Shifting the Burden of Proof Not Fundamentally Unfair

While in a general sense it is true that Anglo-American judicial administration assumes that fundamental fairness requires plaintiff in a civil suit to bear the burden of proof,²⁹ just as the prosecution must bear it in a criminal case,³⁰ this notion is by no means of universal, invariable or rigid

²⁸ Prosser, *Res Ipsa Loquitur: A Reply to Professor Carpenter*, 10 SO. CAL. L. REV. 459, 464 (1937).

²⁹ *Western & A.R.R. v. Henderson*, 279 U.S. 639 (1929); *cf. Mobile J. & K.R.R. v. Turnipseed*, 219 U.S. 35 (1910); *Ferry v. Ramsey*, 277 U.S. 88 (1928). See Fleming, *Developments in the English Law of Medical Liability*, 12 VAND. L. REV. 633, 646 (1959), in PROFESSIONAL NEGLIGENCE 97, 110 (Roady & Anderson ed. 1960), where the author states: "It is, of course, generally accepted as axiomatic in a society dedicated to the values of individualism, that no person shall be made to answer for an event, unless his responsibility for it has been convincingly proved by due process of law."

³⁰ *Tot v. United States*, 319 U.S. 463 (1943); *Morrison v. California*, 291 U.S. 82 (1934); *cf. Speiser v. Randall*, 357 U.S. 513 (1958).

application. Room is left for the operation, within reasonable limits, of the practical necessities of litigation in an adversary system, as well as for the principle that in some circumstances fairness and common sense dictate that the burden of proof be frankly placed on defendant. It is profitable to consider a variety of cases wherein the burden of proof, or of persuasion, is forthrightly placed on defendant.³¹

Res Ipsa Loquitur Cases

In the first place, several jurisdictions such as Alabama,³² Louisiana,³³ Pennsylvania,³⁴ now Colorado,³⁵ and possibly Arkansas³⁶ candidly hold that circumstantial evidence which meets the requirements of *res ipsa loquitur* shifts the burden of proof or persuasion to defendant on the issue of negligence. Far from distorting judicial administration in those states, the shift substantially contributes to the rationality of the process of trial, as we think a careful perusal of the cases cited in this paragraph will substantiate. Further, the propriety of the shift in particular kinds of cases, such as those brought by passengers against common carriers, has been even more widely recognized.³⁷

Presumptions

Sometimes presumptions shift the burden of proof to defendant, as does that of the legitimacy of a child born in wedlock when the party claiming illegitimacy is the defendant.³⁸ All true presumptions require that the assumed fact be accepted in the absence of an explanation which satisfactorily negates the presumption, and hence cause the burden of going forward with the evidence to be placed on the party against whom the presumption operates, often the defendant. The difference between such a shift

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³¹ We have refrained from pointing to "affirmative defenses" as support for our contention that the burden of proof, on negligence, should shift to the defendant. However, it may be noted that, in most jurisdictions, contributory negligence is an affirmative defense and the burden is on defendant to prove and plead it. PROSSER, 197, 283; *cf. id.* 303 (assumption of risk).

³² *Sellers v. Noah*, 209 Ala. 103, 95 So. 167 (1923) (surgeon left needle in patient); *Montgomery & E. Ry. v. Mallette*, 92 Ala. 209, 9 So. 363 (1891) (not a malpractice case).

³³ *Jones v. Shell Petroleum Co.*, 185 La. 1067, 171 So. 447 (1936) (not a malpractice case); *Andrepoint v. Ochsner*, 84 So.2d 63 (La. App. 1955) (explosion of anesthetic gas during operation).

³⁴ *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953) (not a malpractice case); *cf. Maltz v. Carter*, 311 Pa. 550, 166 Atl. 852 (1933) (not a malpractice case).

³⁵ *Weiss v. Axler*, 137 Colo. 544, 328 P.2d 88 (1958) (not a malpractice case). See also *Carrigan, Medical Malpractice in Colorado*, 36 *DICTA* 339, 356-59 (1959).

³⁶ See *Coca-Cola Bottling Co. v. Mattice*, 219 Ark. 428, 243 S.W.2d 15 (1951) (not a malpractice case).

³⁷ PROSSER 213-14.

³⁸ Of course, this is occasionally made a "conclusive presumption," which is merely a synonym for a rule of law. See McCORMICK, *EVIDENCE* 646 (1954). Compare CAL. CODE CIV. PROC. § 1962(5), with § 1963(31). See also WITKIN, *op. cit. supra* note 23, at 82, 95, 367.

of the burden of going forward, and a shift of the true burden of proof, is from the realistic viewpoint of human psychology often a slight one indeed, however elaborate its verbal formulation. An attempt to define the difference to a jury produces complexities largely avoidable by acceptance of the notion that the burden of proof itself shifts. Is the game of drawing this verbal distinction worth the candle? At least, a court that is willing to accord *res ipsa* the status of presumption rather than that of mere inference, would seem to have little practical justification for not going the whole way.

Will Cases

It is the general rule that in a will contest the burden of proof or persuasion as to the testator's sanity is on the proponent of the will, even though vis-à-vis the contestant, the proponent's position seems to be essentially the defensive one.³⁹

Criminal Cases

Even in criminal cases, where the prosecution's burden of proof is the most onerous kind known to our law—proof beyond a reasonable doubt, reinforced by the "presumption of innocence"—considerations of convenience and common sense cause the burden on some issues to be placed often on defendant. Thus where his defense is insanity the defendant, in what is now apparently the majority of jurisdictions, has the burden of proof or persuasion on that issue.⁴⁰ Indeed Oregon, without offending due process according to the United States Supreme Court, makes the defendant bear that burden by proof beyond a reasonable doubt.⁴¹ In some jurisdictions the burden of proof on excuse or mitigation, self-defense and alibi, is on defendant.⁴² In California the defendant, to escape a death sentence in a murder case on the ground of youth, must bear the burden of proving that he was under 18 years of age when the murder was committed.⁴³

Evolving Rules for Special Circumstances

As particular circumstances arise necessitating re-evaluation of ordinarily applicable burden-of-proof principles, the courts do not hesitate to place the burden where in common sense it must lie if justice is not to be frustrated. *Summers v. Tice*⁴⁴ is instructive in this connection. Plaintiff while hunting quail on the open range with the two defendants, was struck in the

³⁹ 9 WIGMORE, EVIDENCE § 2500 (3d ed. 1940); cf. WITKIN, CALIFORNIA EVIDENCE 120 (1958).

⁴⁰ WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 212-72 (1954); WEIHOFEN, INSANITY AS A DEFENSE IN CRIMINAL LAW 172-200 (1933); 9 WIGMORE, *op. cit. supra* note 39, § 2501; PERKINS, CRIMINAL LAW 772 (1957).

⁴¹ Leland v. Oregon, 343 U.S. 790 (1952).

⁴² 9 WIGMORE, *op. cit. supra* note 39, § 2512.

⁴³ CAL. PEN. CODE § 190.1.

⁴⁴ 33 Cal. 2d 80, 199 P.2d 1 (1948).

right eye by birdshot from the shotgun of one, but obviously not both, of the defendants. Both defendants had fired in plaintiff's direction at about the same time or one immediately after the other; both had 12-gauge shotguns using $7\frac{1}{2}$ -size shot; and under the circumstances both were negligent. In affirming a judgment against both defendants, the California Supreme Court unanimously based its conclusion squarely on the doctrine that under the circumstances the burden of proof shifted to defendants—that it rested “with them each to absolve himself if he can.” The court said:

When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favor in this court. In a quite analogous situation this court held that a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability. (*Ybarra v. Spangard*, 25 Cal.2d 486 [154 P.2d 687, 162 A.L.R. 1258].) There the court was considering whether the patient could avail himself of *res ipsa loquitur*, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to defendants to explain the cause of the injury. It was there said: “If the doctrine is to continue to serve a useful purpose, we should not forget that ‘the particular force and justice of the rule, 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.’” (P. 490.) Similarly in the instant case plaintiff is not able to establish which of defendants caused his injury.⁴⁵

In like vein, it has been recognized that where two or more defendants are shown to be at fault and each to have caused some damage, but the extent to which the fault of each operated is in question, the burden of proof shifts to the defendants and each is liable except as he exculpates himself from responsibility.⁴⁶

⁴⁵ *Id.* at 86-87, 199 P.2d at 4.

⁴⁶ PROSSER 229 & nn.90, 91.

B. *Res Ipsa Loquitur* a Feasible Instrumentality

It is argued that *res ipsa loquitur*, being only a principle of circumstantial evidence, is an inappropriate vehicle by which to shift the burden of proof to defendant where the real basis of the shift is that a special responsibility was undertaken by defendant or there is a deliberate social policy of compelling defendant to pay or explain.⁴⁷ It is undoubtedly true that the special responsibility of medical personnel for a patient's safety, implicit in operations and other medical procedures, was a principal factor justifying application of *res ipsa* in the leading case of *Ybarra v. Spangard*,⁴⁸ although the consideration of accessibility of information to such personnel as compared with the patient is not to be ignored. Probably if we could start afresh in an ideal world, unaffected by verbal confusions, we could articulate, independently of circumstantial evidence principles, a doctrine more aptly calculated to effectuate the physician's duty to communicate, than is *res ipsa loquitur*. Such a doctrine, resting as it would on the physician's duty fully to communicate with his patient according to the latter's needs respecting all incidents of the professional relationship, doubtless would be of more comprehensive application than that of *res ipsa* even as applied in the *Ybarra* case. In any event, *res ipsa* seems to be the most appropriate of existing doctrines available to effectuate the physician's duty;⁴⁹ and in view of the common law's pragmatic method of growth and development, it is certainly not surprising that it has been seized upon for this purpose. Actually, the factor of relative accessibility of information to medical personnel as contrasted with the patient, a factor sometimes regarded as a fourth condition for applicability of *res ipsa loquitur*,⁵⁰ would have been enough to force this doctrine to the foreground in malpractice cases, for in few other *res ipsa* cases is access to the true explanation so often so one-sided.

If placing the burden of proof on defendant under *res ipsa* would promote more rational results in malpractice cases, or at least some of them, there seems to be no sound reason why this should not be done by courts, in cases deemed appropriate, even if they are unwilling to go the whole way of transferring the burden of proof in all *res ipsa* cases. The common law method is to meet the exigencies of cases as presented, with a step-by-step approach.

C. *Propriety of Shifting the Burden Not Negated by Variety of Cases Affected*

There remains for consideration the final argument against using *res ipsa loquitur* to shift the burden of proof to defendant on the negligence

⁴⁷ PROSSER 208, 214.

⁴⁸ 25 Cal. 2d 486, 154 P.2d 687 (1944), 162 A.L.R. 1258 (1946).

⁴⁹ Short, of course, of absolute or strict liability's being imposed. See note 56 *infra*.

⁵⁰ See 2 HARPER & JAMES § 19.9; PROSSER 209-10.

issue. It is that the doctrine is applied in a wide variety of cases differing materially in their facts; that the strength of the conclusion of negligence from a logical viewpoint varies with the facts of each case; that each case is a problem in itself; and therefore that an indiscriminate shift of the burden of proof, just because a case is within the *res ipsa* category, would be based upon an unwarranted generalization. It must be conceded that there is force to this objection. Undoubtedly the strength of the assumption of negligence varies according to the facts of each malpractice case, as it does according to the facts of other tort cases. The assumption of negligence is likely to be logically stronger when the patient's wrong leg is amputated, than when a nerve in the operative field is severed. Further, the relative capacities of physician and patient to know the true explanation will vary according to the facts of the case, ranging from the circumstance where the patient under general anesthesia can be expected to know nothing, to that where he observes what goes on and therefore perhaps knows something of the significance of the physician's performance. Thus in some cases the patient will have greater need than in others that the physician fulfill his duty to communicate and explain.

But the foregoing argument seems to prove too much. If the inevitable variation of fact situations from case to case prevents generalization, this would be a reason against any rule of *res ipsa loquitur*, regardless of its particular procedural effect. Generalization has been permissible because of application of the three classic conditions of *res ipsa loquitur*.⁵¹ These of course would continue to operate as limiting factors⁵² even under a rule shifting the burden of proof to defendant. Actually, shifting the burden to defendant realistically viewed puts an onus on him little more severe than that which in any event inheres in the doctrine itself.⁵³ That is, a jury ques-

⁵¹ See 2 HARPER & JAMES §§ 19.6-8; PROSSER 199; James, *Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur)*, 37 VA. L. REV. 179, 200-13 (1951). For a discussion of the doctrine in federal courts, particularly in the light of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), see 5 MOORE, FEDERAL PRACTICE ¶ 43.08 (2d ed. 1951). For a study of *res ipsa loquitur* primarily as developed in cases of the British Commonwealth, and especially Australia, but including American cases, see FLEMING, TORTS 297 (1957). See also, for recent discussions of the doctrine in English malpractice cases, NATHAN, MEDICAL NEGLIGENCE 108-31 (1957), and in Canadian cases, MEREDITH, MALPRACTICE LIABILITY OF DOCTORS AND HOSPITALS 93-99 (1956). A discussion written primarily for dentists appears in CARNAHAN, THE DENTIST AND THE LAW 161-77 (1955).

⁵² However, these factors certainly will not remain static. Advances in common knowledge and enlightened utilization of judicial notice of medical data are bound to continue. See, e.g., *Kennedy v. Parrott*, 243 N.C. 355, 90 S.E.2d 754 (1956), 56 A.L.R.2d 695 (1957). Courts will probably increasingly realize that medical standards, at least as they relate to negligence, are becoming uniform and are described in recognized publications.

⁵³ Also, this onus of revealing facts differs little if any from the duty of explaining faced by the average physician almost every day of his practice. Such a difference is likely to be chiefly in the forum in which the explanation is made. To persuade a patient, say, to follow orders issued in treatment of peptic ulcer invokes essentially the same quality and quantity of explana-

tion is made out as readily under the prevailing inference rule, as it would be under the rule shifting the burden of proof. This is why some students have characterized the controversy respecting the doctrine's procedural effect as a "tempest in a teapot." The shift would, however, facilitate intelligible instructing of the jury, tend to minimize occasions for reversal, and thereby promote rationality in the judicial process.

Such a shift should not be confused with a rule of absolute liability. In fact, it might well be that a rule requiring physicians frankly to face up to an obligation to explain untoward results to the best of their ability, would produce a public psychology that would accord them a fairer, even a more sympathetic, hearing than that accorded under the cat-and-mouse psychology of today's secrecy. In any event, when a jury unreasonably refused to find that the physician had sustained his burden of exculpating himself, it would be at least as subject to judicial control as it is under the prevailing rule today. And it is reasonable to expect that the control would be more forthrightly exercised, in that less frequently than today would complicated jury instructions be seized upon as the pretext for a reversal really motivated by other factors.

CONCLUSION

In view of the considerations discussed in this Article, we have concluded that where under the facts *res ipsa loquitur* is applicable, it would promote fairness and rationality to give to the doctrine the effect of shifting the burden of proof on the issue of negligence to defendant. Recently the Colorado Supreme Court noted without dissent:

It seems a proper sequitur to say that the more we are removed from "the horse and buggy days," the more intensified and diversified our industrialism, mechanics and science become, the more technology and automation advance, the more the doctrine of *res ipsa loquitur* should take on a stellar role in the law of negligence. The necessity to remove existing confusion and to state a formulary for the use of the doctrine thus appears obvious.⁵⁴

These considerations we think often are uniquely pertinent to the medical malpractice case. This is especially true as to modern operating room techniques, but it has relevancy to medical techniques in general. The factor of the physician's greater access to the facts is doubtless especially true as to occurrences in the operating room, but likewise has relevancy to all medical techniques and tends to increase as techniques become more complex. To recognize these realities in our procedural law, in the most efficient way consistently with fairness, is not harsh or punitive in spirit. On the con-

tion that is required by a legally shifted burden of proof. In fact, when such an explanation is made at the time of the questioned occurrence, a malpractice suit is not likely to develop.

⁵⁴ Weiss v. Axler, 137 Colo. 544, 548, 328 P.2d 88, 91 (1958).

trary, it is an evolutionary step in the development of the common law's ancient concept of the nature of the physician's special undertaking.⁵⁵ The fulfillment of the physician's duty honestly to communicate with his patients, implicit in that concept, requires application in appropriate cases of the doctrine of *res ipsa loquitur*. And rational results under that doctrine are best achieved when it candidly is held to shift the burden of proof on the negligence issue to defendant.

It is not reasonable application of *res ipsa loquitur*, but the only feasible alternative thereto, that could perhaps rightly be regarded as harsh, even revolutionary. That alternative was spelled out by the unanimous California Supreme Court in *Ybarra v. Spangard*:

Without the aid of . . . [*res ipsa loquitur*] a patient who received permanent injuries of a serious character, obviously the result of someone's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. . . . If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of *res ipsa loquitur* is properly applicable to the case before us.⁵⁶

The showing that *res ipsa loquitur* is applicable should "cast the burden of proof by a preponderance of the evidence upon the defendant to establish that defendant was either not negligent or was not the cause of the injury."⁵⁷ While we believe this conclusion is warranted in respect of *res*

⁵⁵ See PROSSER 208. The realization of the importance of *res ipsa loquitur* in modern society doubtless accounts for the increasing tendency to admit expert evidence on the issue as to whether the event would have occurred in the absence of negligence, *Wolfsmith v. Marsh*, 51 Cal. 2d 832, 337 P.2d 70 (1959); *Bauer v. Otis*, 133 Cal. App. 2d 439, 284 P.2d 133 (1955), as well as to hold that more and more types of medical techniques are within lay knowledge. *James v. Spear*, 170 Cal. App. 2d 17, 338 P.2d 22 (1959) (cornea injured during treatment of tear duct); *Atkins v. Humes*, 110 So.2d 663 (Fla. 1959) (ischemic paralysis of arm after treatment of fracture at the elbow); *Dohr v. Smith*, 104 So.2d 29 (Fla. 1958) (dental bridgework dislodged and allowed to fall into trachea during anesthesia); *Daiker v. Martin*, 91 N.W.2d 747 (Iowa 1958) (amputation necessitated by tight cast in treatment of leg fractures); *Bessinger v. DeLoach*, 230 S.C. 1, 94 S.E.2d 3 (1956) (burn from dentist's impression mixture).

⁵⁶ 25 Cal. 2d 486, 490-91, 154 P.2d 687, 689 (1944). Beyond the common law's concept of strict liability, of course, is the potential of substitution of insurance principles for fault liability. See 2 HARPER & JAMES § 26.5. See also EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); EHRENZWEIG, "FULL AID" INSURANCE FOR THE TRAFFIC VICTIM (1954); Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445 (1950); Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U.L. REV. 855 (1953); GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE (1958).

⁵⁷ Carpenter, *The Doctrine of Res Ipsa Loquitur in California*, 10 SO. CAL. L. REV. 166, 187 (1937). See Seavey, *Res Ipsa Loquitur: Tabula in Naufragio*, 63 HARV. L. REV. 643, 646 (1950), where the author, generally critical of the *Ybarra* case, nevertheless states: "Where it is reasonably clear that something has gone wrong during an operation from which the plaintiff suffers

ipsa in malpractice cases generally, we submit with confidence that in any event it is sound as applied to patients injured while under general anesthesia, such as the plaintiff in the *Ybarra* case.

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harm, the burden of proof that there was no negligence might well be upon the physician. It would seem to be just that where plaintiff has submitted himself or his property to another, the other should be under a duty to explain any resulting harm which would not normally occur without negligence on the defendant's part. This would be in line with the rule that a bailee who cannot redeliver a bailed chattel in good condition has the burden of proving that there has been an event, such as a fire or a theft, which caused the harm or loss. For the same reason, a statutory rule existing in some states puts on the first of a series of carriers the burden of showing that the loss or harm to goods did not occur while in its possession. There should be the same burden of proof on a carrier for an accident which has happened to a passenger." (Author's footnotes omitted.)