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Torts-Res Ipsa Loquitur in Medical Malpractice

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and could not have been discovered by the vendor upon inspection. For what the code requires is not evidence that the defects should or could have been uncovered by the seller, but only that the goods upon delivery were not of a merchantable quality or fit for their particular purpose.[11]

Even if one inclines toward the position taken by the minority in the principal case and considers that the majority opinion does violence to well-established principles of law in West Virginia, it should be remembered that the case has little value as a precedent setting decision since it deals with West Virginia law as it existed *prior* to the adoption of the Uniform Commercial Code. Therefore, the principles of the case would apply only to contracts of sale arising before July 1, 1964. The unimportance of the case in setting precedent may in part account for the court's willingness to strain reason and principles of law in order to arrive at what they felt to be an equitable result.

Peter Thomas Denny

Torts—Res Ipsa Loquitur in Medical Malpractice
Foreign Object Left in the Patient

Action was brought by a patient against her physician to recover damages for injuries sustained through alleged negligence of physician in failing to remove laparotomy pad (lap pad) inserted in the patient's abdomen during the course of surgery. The trial court held that the *res ipsa loquitur* doctrine was not applicable and required her to produce *expert evidence* to establish *D's* negligence and *P* appealed to the Supreme Court of Appeals of Virginia. *Held,* reversed and remanded. Expert evidence is not required to establish the physician's negligence where the patient showed (1) that while she was in an unconscious state the physician was in complete control of the operation and (2) the failure of physician to remove the lap pad from her abdominal cavity before closing the wound constitutes such a breach of duty owed to her that (3) a layman could infer negligence without the aid of expert testimony. Under these facts the doctrine of *res ipsa loquitur* is applicable. *Easterling v. Walton,* 156 S.E.2d 787 (Va. 1967).

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[11] Vlases v. Montgomery Ward & Co., 377 F. 2d 846 (3d Cir. 1967).

It is often stated that negligence must be proved and will never be presumed,[1] mere proof of injury not being sufficient.[2] However, negligence, like any other fact, may be established by circumstantial evidence.[3] One aspect of circumstantial evidence is the doctrine of *res ipsa loquitur* which means that "the thing speaks for itself."[4] Three important questions to be considered are (1) when will the doctrine be applied; (2) what is its effect when applied; and (3) how will it be applied to medical malpractice cases in West Virginia.

The conditions which are necessary for the application of the doctrine are usually stated as follows: "(1) the event 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."[5]

Some courts, including West Virginia, have alluded to a fourth condition that "evidence of the true cause of the injured person's injury is accessible to the defendant, but practically inaccessible to the injured person."[6] The better view would apparently be not to treat this as a requirement but rather merely a factor that is frequently present, especially in the medical malpractice cases involving patients under anesthesia.[7] It would appear that if the circumstances of the

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[1] W. PROSSER, TORTS, § 39 at 215 (3d ed. 1964).

[2] Goff v. City Lines of W. Va., 130 W. Va. 220, 223, 43 S.E.2d 800, 801 (1947); Keyser Canning Co. v. Klots Throwing Co., 94 W. Va. 346, 360, 118 S.E. 521, 526 (1923).

[3] W. PROSSER, *supra* note 1, at 216, citing 2 WIGMORE, *Evidence*, § 25 (3d ed. 1940).

[4] W. PROSSER, *supra* note 1, at 217.

[5] W. PROSSER, *supra* note 1, at 218; citing 4 WIGMORE, *Evidence*, § 2509 (1st ed. 1905); Mecum v. Food Machinery and Chemical Corp., 143 W. Va. 627, 638, 103 S.E.2d 897, 904 (1958); Ellis v. Henderson, 95 S.E.2d 801 (W. Va. 1957) *decision recalled*, 142 W. Va. 824, 828, 98 S.E.2d 719, 721 (1957); Barker v. Withers, 141 W. Va. 713, 716, 92 S.E.2d 705, 707 (1956); Jones v. Bridge Co., 70 W. Va. 374, 376, 73 S.E. 942, 943 (1912); Bice v. Wheeling Electrical Co., 62 W. Va. 685, 691, 59 S.E. 626, 628 (1907).

[6] Ellis v. Henderson, 95 S.E.2d 801, 805 (W. Va. 1957) *decision recalled*, 142 W. Va. 824, 98 S.E.2d 719, 721 (1957); *accord*, Stein v. Powell, 203 Va. 423, 426, 124 S.E.2d 889, 890 (1962); Middlesboro Coca-cola Bottling Works, Inc. v. Campbell, 179 Va. 693, 699, 20 S.E.2d 479, 481 (1942); McCall v. U.S. 206 F. Supp. 421, 425 (E.D. Va. 1962).

[7] See Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 560, 568, 317 P.2d 170, 175 (1957). The court, in explaining the reasons for the application of *res ipsa loquitur* to medical malpractice cases, stated that "usually the patient is by reason of anesthesia or lack of medical knowledge in no position to know what occured that resulted in harm to him."

case create a reasonable inference of the defendant's negligence, then the inference should not be barred merely because defendant shows that he knows nothing about how the injury occured.[8] On the other hand, in the medical malpractice cases, and most especially in those cases involving a foreign object left in the body of a patient, this fourth element is usually present and raises little or no problem since it could hardly be contended that laymen, under anethesia had more knowledge of the situation than the surgeon.

The requirement that the injury must not have been due to any voluntary action or contribution on the part of the plaintiff[9] is merely present to eliminate from consideration the possibility that plaintiff was the one responsible.[10] This requirement merely narrows the scope of inferences that may be drawn from the evidence. The West Virginia cases often refer to applying the doctrine of *res ipsa loquitur* when the injured person is "without fault."[11] This would not be a problem in the case of a foreign object left in the body of a patient.[12]

The requirement that the injury be caused by an instrumentality within the control of the defendant is merely another way of stating that negligence in the air will not do and must be brought home to the defendant.[13] Thus the West Virginia cases have held that the doctrine cannot be invoked where the accident may have resulted from causes over which defendant had no control.[14] *Control* should be interpreted to raise the question whether the defendant had the *right to control,* rather than whether control was actually exercised or not.[15] The doctrine of *res ipsa loquitur* will not apply when the element of control is lacking or as stated in the West Virginia cases,

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[8] W. PROSSER, *supra* note 1, at 229.

[9] Authorities cited note 5 *supra.*

[10] W. PROSSER, *supra* note 1, at 228.

[11] Mecum v. Food Machinery & Chemical Corp, 143 W. Va. 627, 638, 103 S.E.2d 897, 899 (1968); Pope v. Edward M. Rude Carrier Corp., 138 W. Va. 218, 229, 75 S.E.2d 584, 590 (1953); Wright v. Balan, 130 W. Va. 466, 473, 43 S.E.2d 364, 368 (1947).

[12] In the more general malpractice case where the plaintiff is suing because of a "bad result" and it might be contended that plaintiff did not properly care for himself, it will be seen that *res ipsa* should not apply.

[13] W. PROSSER, *supra* note 1, at 222.

[14] Mabe v. Huntington Coca-cola Bottling Co. 145 W. Va. 712, 718, 116 S.E.2d 874, 878 (1960); Barker v. Withers, 141 W. Va. 713, 717, 92 S.E.2d 705, 707 (1956); Phillipi v. Farmers' Mut. Tel. Co., 113 W. Va. 470, 473, 168 S.E. 762, 763 (1933).

[15] W. PROSSER, *supra* note 1, at 224.

when there is "divided responsibility."[16] In the principal case this requirement was satisfied by the testimony of a nurse that the surgeon had complete control over the operation and the persons assisting him and as such was "captain of the ship."[17] In the case of a foreign object left in the body of a patient control should not be a troublesome requirement.[18]

The requirement that the event be of a kind which ordinarily does not occur in the absence of someone's negligence is the prerequisite which causes the most difficulty in applying *res ipsa loquitur* to medical malpractice cases. This requirement is necessary in order to provide a reasonable basis on which to draw an inference of negligence.[19] The principle is often stated in West Virginia cases that the doctrine is inapplicable unless the only *reasonable* conclusion deductible from the circumstances is that the casualty happened through defendant's negligence.[20] The general principle in medical malpractice actions is that the doctrine of *res ipsa loquitur* may be invoked only where a layman would be able to say as a matter of common knowledge that the consequences of the treatment were not what would have ordinarily followed if due care had been exercised.[21] This provides the basis for the general distinction in the cases to which *res ipsa* will or will not be applied. The doctrine would generally be inapplicable in a malpractice case predicated on the fact that the treatment was unsuccessful or there were unfortunate results, but *res ipsa* is applicable when the cause of action is based on specific negligent acts or omissions.[22] In other words, the

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[16] Mullins v. Baker, 144 W. Va. 92, 99, 107 S.E.2d 57, 62 (1959); *accord*, Laurent v. United Fuel Gas Co., 101 W. Va. 199, 512, 133 S.E. 116, 122 (1926).

[17] Easterling v. Walton, 156 S.E.2d 787, 789 (Va. 1967).

[18] This should be compared with other medical malpractice cases where the injury occurs outside the operating room and where the surgeon does not have control: Sherman v. Hartman, 137 Cal. App. 2d 589, 290 P.2d 894 (1955) (Blood transfusion in patient's room negligently administered by nurse—*res ipsa* held not applicable); Blackman v. Zelids, 90 Ohio App. 304, 103 N.E.2d 13 (1951) (*res ipsa loquitur* held not applicable to defendant-physician for negligence of hospital employees in preparing plaintiff for operation).

[19] W. PROSSER, *supra* note 1, at 218; Note, *The Use of Expert Evidence in Res Ipsa Loquitur Cases*, 106 PENN. L. REV. 731 (1958).

[20] Ellis v. Henderson, 95 S.E.2d 801, 804 (W. Va. 1957) *decision recalled*, 142 W. Va. 824, 828, 98 S.E.2d 719, 721 (1957); Barker v. Withers, 141 W. Va. 713, 716, 92 S.E.2d 705, 707 (1956); Crotty v. Virginian Ry., 115 W. Va. 558, 563, 177 S.E. 609, 611 (1935).

[21] Annot., 82 A.L.R.2d 1262, 1274 (1962).

[22] Annot., 162 A.L.R. 1265, 1267 (1946). This distinction is made and pertinent cases are discussed.

doctrine should clearly apply to a situation such as the principal case in which a foreign object was left in the body of a patient, because by the very nature of the omission laymen are able to infer that due care was not exercised.[23]

It is also the general rule that *res ipsa loquitur* may be invoked only where a layman, as a matter of common knowledge, can say that the consequences of the doctor's treatment would not have occurred if due care had been exercised.[24] Thus *res ipsa* forms an exception to the general requirement that expert evidence is necessary to support an action for negligence against a physician or surgeon.[25] This requirement of expert testimony is based on the idea that juries of laymen are "normally incompetent to pass judgment on questions of medical science or technique."[26] Since the doctrine of *res ipsa* is correctly applied to those cases where laymen as a matter of common knowledge can infer that due case was not exercised, the two theories are perfectly consistent. The final result is that "expert testimony is a prerequisite in a malpractice case except where it can be said that a 'thing speaks for itself'."[27]

The great majority of American courts treat *res ipsa loquitur* as merely a form of circumstantial evidence that leaves the *inference* to be drawn to the jury.[28] The statement is often found in the cases that the application of *res ipsa* raises a *presumption* of negligence, but it appears that these cases are being overruled today.[29] The better view would appear to be that by the application of *res ipsa* the plaintiff has sufficient evidence to go to the jury but he still has the burden of proof.[30] This burden is not shifted to the defendant,

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[23] Annot., 162 A.L.R. 1265, 1299 (1946); Note, *Use of Expert Evidence in Res Ipsa Loquitur Cases*, 106 PENN. L. REV. 731, 731 (1958).

[24] Annot., 82 A.L.R.2d 1262, 1274 (1962).

[25] Annot., 141 A.L.R. 5, (1942); Annot., 81 A.L.R.2d 597 (1962).

[26] W. PROSSER, *supra* note 1, section 32 at 167.

[27] 60 MICH. L. REV. 1153, 1162 (1962). The article also states that some courts create an added difficulty, in cases where laymen cannot determine if the accident would have occured if due care had been exercised, by stating that *res ipsa* does not apply because there is no expert testimony.

Other authorities have advanced the view that expert evidence might be introduced by either party to give a foundation, or to demonstrate the lack thereof, for application of *res ipsa* where a layman cannot say whether the thing speaks for itself or not. Note, *The Use of Expert Evidence in Res Ipsa Loquitur*, 106 PENN. L. REV. 731, 735 (1958). For cases where this has been applied see *Id.*, 736-738.

[28] W. PROSSER, *supra* note 1, at 233; Annot., 53 A.L.R. 1494 (1928); Annot., 167 A.L.R. 658 (1947).

[29] W. PROSSER, *supra* note 1, at 235.

[30] *Id.* at 233.

except in the non-procedural sense that if he fails to rebut the inference the jury may very well find against him.[31] The language that is most often used and which was also cited in the principal case is the following: ". . . *[R]es ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference . . . that they call for explanation or rebuttal, not necessarily that they require it . . . ."[32]

Although there has been frequent reference throughout this comment to *res ipsa* cases in West Virginia, none of these cases were medical malpractice cases. West Virginia is in substantial accord with the general requirements and ramifications of the *res ipsa doctrine* However, research has disclosed only one West Virginia medical malpractice case which considered the doctrine and there it was rejected. The case, *Vaughan v. Memorial Hospital,*[33] was one in which the doctrine in the better view[34] would not apply. The cause of action was founded almost entirely upon the *result* which followed the treatment and the basic question was concerned with a doctor's choice of methods in setting a broken leg.[35] The court stated, on the basis of policy reasons that will be discussed below, that *res ipsa* would not apply.[36] Defendant was awarded a new trial and when the same case again came before the West Virginia Supreme Court of Appeals the court stated that: "The doctrine of *res ipsa loquitur* does not apply. The negligence of a surgeon is ascertained by pointing to something he should have done or did do which was not in accord with reasonable care and diligence . . . and is not ascertained by the results."[37] The general rule in medical malpractice cases in West Virginia is that negligence or want of professional skill must be proved by expert witnesses.[38] This rule has been modified to permit negligence to be established by lay witnesses in cases where there is such a want of skill as to dispense with the need for expert

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[31] *Id.*

[32] Sweeney v. Erving, 228 U.S. 233, 240 (1913). The West Virginia cases are in agreement, e.g., Holley v. Purity Baking Co. 128 W. Va. 531, 537, 37 S.E.2d 729, 732 (1946); Wright v. Valan, 130 W. Va. 466, 476, 43 S.E.2d 364, 370 (1947).

[33] 100 W. Va. 290, 130 S.E. 481 (1925).

[34] *See* text at note 22 *supra.*

[35] Vaughan v. Memorial Hospital, 100 W. Va. 290, 130 S.E. 481 (1925).

[36] *Id.* at 294, 130 S.E. at 482. Discussed in text at note 44.

[37] Vaughan v. Memorial Hospital, 103 W. Va. 156, 163, 136 S.E. 837, 840 (1927).

[38] Roberts v. Gale, 149 W. Va. 166, 172, 139 S.E.2d 272, 276 (1964); Schroeder v. Adkins, 149 W. Va. 400, 410, 141 S.E.2d 352, 358 (1965); Buskirk v. Bucklew, 115 W. Va. 424, 425, 176 S.E. 603 (1934).

testimony.[39] However, this is not the same as *res ipsa loquitur*. *Res ipsa* does not require the showing of what actually occurred. In fact if all the circumstances and facts appear in evidence, there is nothing left to infer and the doctrine is inapplicable.[40] With the use of *res ipsa* plaintiff does not need to show what occurred or that what occurred was negligent. The West Virginia exception to the requirement of expert testimony to establish negligence means that the plaintiff still must show what occurred but does not need an expert to testify that the standard of care was breached.[41]

Therefore the question that must be asked is whether, given a suitable case, the courts of West Virginia would go one step further and approve the use of *res ipsa loquitur* in a medical malpractice case. This question has not been presented to the West Virginia court, at least not in a suitable case, and the reason is probably due to a statute of limitations problem that has since been cured. When a surgical instrument or pad has been left inside the patient's body, it is unlikely that the patient will discover the injury for some time. There will probably be a period of believing that the soreness and discomfort is normal from an operation, and then a longer period before the plaintiff finally finds the injury. The initial position of the West Virginia court was that the cause of action for malpractice accrued at the time of the operation and relief was barred where the action was not brought within one year.[42] This view was not overruled until 1965 when it was held that the statute of limitations did not commence to run until plaintiff learned or by the exercise of reasonable diligence should have learned of the injury.[43] This decision

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[39] Roberts v. Gale, 149 W. Va. 166, 172, 139 S.E.2d 272, 276 (1964); Buskirk v. Bucklew, 115 W. Va. 424, 425, 176 S.E. 603 (1934).

[40] Newark Ins. Co. v. Davis, 139 F. Supp. 396, 399 (S.D.W. Va. 1956).

[41] This can best be illustrated by contrasting the two types of cases. In Howell v. Biggart, 108 W. Va. 560, 152 S.E. 323 (1930), the doctor continued to administer a drug which was producing obviously harmful results on the patient. The patient's evidence clearly established the mode of treatment. In Buskirk v. Bucklew, 115 W. Va. 424, 176 S.E. 603 (1934), the defendant–doctor continued to administer x-ray treatment until the patient was so severely burned as to be unable to work. Again plaintiff's evidence established what occurred.

The above cases should be contrasted with those where the doctrine of *res ipsa* was clearly applicable, *e.g.*, Jefferson v. U.S., 77 F. Supp. 706, *aff'd*, 178 F.2d 208 (D.C. Md. 1948) where although recovery was denied on other grounds the court stated that the evidence showed that the towel was from plaintiff's operation and this justified the inference that what occurred was negligent. Easterling v. Walton, 156 S.E.2d 787 (Va. 1967); Ales v. Ryan, 8 Cal. 2d 82, 64 P.2d 409 (1937); Tiller v. Von Pohle, 72 Ariz. 11, 230 P.2d 213 (1951).

[42] Gray v. Wright, 142 W. Va. 490, 500, 96 S.E.2d 671, 676 (1957).

[43] Morgan v. Grace Hospital, 149 W. Va. 783, 144 S.E.2d 156 (1965).

will permit the question of the use of *res ipsa loquitur* in a suitable medical malpractice case to be squarely presented to the court.

The court's answer will depend on the basic policy considerations before it. It appears that opposition to the use of *res ipsa loquitur* in a medical malpractice case is often based on a misconception of its effect. Cases that refuse the application of the doctrine[44] almost invariably use language similar to that in a West Virginia case[45] discussed above:

> A physician is not a warrantor of cures. If the maxim *res ipsa loquitur* were applicable . . . 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 the flesh is heir to.[46]

The problem with the quoted language is that a case founded on a bad result is exactly the type of case to which *res ipsa* should not apply.[47] Another reason that is often advanced for not applying the doctrine to malpractice cases is that plaintiffs rarely lose *res ipsa* cases, except where the defendant's explanation is very convincing which is relatively rare occurrence.[48] But it appears that this statement, if it is true, is a result of the type of case to which *res ipsa* will apply and is not a result of the doctrine.

On the other hand there are weighty arguments advanced for acceptance of the doctrine. First, although admittedly expert evidence would be preferable it is often unavailable due to the "conspiracy of silence."[49] It has also been advanced that *res ipsa* should be applied because the patient is under anesthesia or without medical knowledge,[50] and therefore knowledge of the facts is peculiarly

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[44] For a comprehensive listing of cases where *res ipsa* was held not applicable see, Annot., 162 A.L.R. 1265, 1269 (1946); Annot., 82 A.L.R.2d 1262, 1277 (1962).

[45] Vaughan v. Hospital, 100 W. Va. 290, 294, 130 S.E. 481, 482 (1925).

[46] *Id.* at 294 (emphasis added). The court is quoting from Ewing v. Goode, 78 Fed. 442 (1897).

[47] *See* text at note 22 *supra.*

[48] 2 HARPER AND JAMES, *The Law of Torts* § 19.11, 1099 (1956).

[49] Comment, 60 MICH. L. REV. 1155 (1962); W. PROSSER, *supra* note 1, at 167, citing a number of cases; Salgo v. Leland Standford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (1957), (giving a discussion of the problems involved).

[50] Salgo v. Leland Standford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 568, 317 P.2d 170, 175 (1957).

within the possession of the doctor.[51] Still another argument for the application of the doctrine is that plaintiff should not be barred from the doctrine merely because he is suing a doctor rather than a bottle or airplane manufacturer.[52] In this regard perhaps a statement that appeared in a 1934 article in the West Virginia Law Quarterly is both apropos and conclusive:

> As the practice of medicine in its various branches tends to become a business rather than a personal relation . . . when the medical profession laid aside as outmoded and unsanitary the shawl of the family doctor . . . and assume the efficient white jacket of specialization and commercialism, it likewise lost the armor of infallibility that the shawl concealed.[53]

Martin J. Glasser

Wills—Contingent

T died of natural causes. He left a holographic will while prefaced dispositive provisions with the clauses "In event that I get killed. . ." and "In case of accident. . ." The Chancery Court refused to admit the will to probate on the basis that the operation of the will was contingent upon *T's* being killed or dying in an accident. *Held,* affirmed and remanded. The language employed in the will was clearly conditional upon the death by accident or violent means, and death having occurred due to natural causes, the attempted testamentary disposition became inoperative and void, and was properly denied for probate. *In re Estate of Martin,* 199 So.2d 829 (Miss. 1967).

The principal case is one of a long line of cases in which the courts have been presented with the problem of determining whether the operation of a particular holographic will was contingent on the occurrence of a specified event or whether the will was absolute and intended to be operative in any event. The decision in the principal case appears to be a very sound and justifiable one. However, it appears to be rather difficult to reconcile this decision with West Virginia decisions dealing with the same issue. Thus, it is of value to

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[51] 60 MICH. L. REV. 1153, 1154 (1962).
[52] *Id.* at 1155.
[53] Posten, *The Law of Medical Malpractice in West Virginia,* 41 W. VA. L. Q. 35 (1934).