View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by EngagedScholarship @ Cleveland State University

Cleveland State University
EngagedScholarship@CSU

Cleveland-Marshall
College of Law Library

Cleveland State Law Review

Law Journals

1968

Res Ipsa Loquitur in Medical Malpractice

Rudolf F. Binder

Follow this and additional works at: https://engagedscholarship.csuohio.edu/clevstlrev


Part of the Medical Jurisprudence Commons, and the Torts Commons

How does access to this work benefit you? Let us know!

Recommended Citation

Rudolf F. Binder, Res Ipsa Loquitur in Medical Malpractice, 17 Clev.-Marshall L. Rev. 218 (1968)

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

Res Ipsa Loquitur in Medical Malpractice

*Rudolf F. Binder**

THE "CLOAK OF PROTECTION encompassing the physician in the practice of his profession" is no longer to be taken for granted.[1] Recent decisions in Alaska,[2] California,[3] Louisiana,[4] Oregon,[5] and Wisconsin[6] have swept aside the traditional limitations in the use of the *res ipsa loquitur* doctrine. They impose all but *strict liability* upon the medical profession for mistakes occurring during treatment or surgery.

The phrase *res ipsa loquitur* was first used in England in 1863.[7] It soon was developed into a doctrine of circumstantial evidence and found entrance into American law.[8] Usually four conditions are stated for the application of *res ipsa loquitur*: (1) the event must be of a kind that ordinarily does not occur in the absence of negligence; (2) the defendant alone must have been in possession of the instrumentality which caused the accident; (3) the accident must not have been due to any voluntary action or contribution on the part of the plaintiff; (4) the evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

The Law Prior to 1964

Reviewing the state of the law before 1964, it is found that in some states the doctrine did not apply to medical malpractice cases, because medicine was not thought of as an exact science and many of the responses of the human body to treatment and surgery are only poorly understood.[9] Other jurisdictions allowed the application of the doctrine

* M.D., Univ. of Vienna (Austria, 1950); Diplomate, American Board of Ophthalmology (1963); Assistant Professor of Ophthalmology at Western Reserve Univ. (1959-1965); practicing physician in Cleveland, Ohio.

1 Mills, Res Ipsa Loquitur and the Calculated Risk in Medical Malpractice, 30 So. Cal. L. Rev. 80 (1956).

2 Patrick v. Sedwick, 391 P. 2d 453 (Alaska, 1964).

3 Quintal v. Laurel Grove Hosp., 62 Cal. Rptr. 154, 397 P. 2d 161 (1965); Tomei v. Henning, 62 Cal. Rptr. 9, 431 P. 2d 633 (1967).

4 Herbert v. Travelers Indem. Co., 193 So. 2d 330 (La. App. 1966).

5 Mayor v. Dowsett, 240 Ore. 196, 400 P. 2d 234 (1965).

6 Beaudoin v. Watertown Memorial Hosp., 32 Wisc. 2d 132, 145 N.W. 2d 166 (1966).

7 Prosser, Law of Torts, 217 (1964 3d ed.)

8 George v. St. Louis, I. M. & S. R. Co., 34 Ark. 613 (1879).

9 82 A.L.R. 2d 1269 (1962); 70 C.J.S. 994 (1951); Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 317 P. 2d 170 (1957); Dodson v. Pohle, 73 Ariz. 186, 239 P. 2d 591 (1952); Adams v. Heffington, 216 Ark. 534, 226 S.W. 2d 352 (1950); McDermott v. St. Mary's Hosp. Corp., 144 Conn. 417, 133 A. 2d 608 (1957); Johnston v. Rodis, 151 F. Supp. 345 (D.D.C. 1957); Merker v. Wood, 307 Ky. 331 210 S.W. 2d 946 (1948); Bettigole v. Diener, 210 Md. 537, 124 A. 2d 265 (1956); Lane v. Calvert, 215 Md. 457, 138 A. 2d 902 (1958); Thompson v. Lillehei, 164 F. Supp. 716 (D. Minn. 1958); Williams v. Chamberlain, 316 S.W. 2d 505 (Mo. 1958); Shockley v. Payne, 348 S.W. 2d 775 (Tex. App. 1961); Bell v. Umstattd, 401 S.W. 2d 306 (Tex. App. 1966).

only if it was a matter of common knowledge among laymen that the patient's injury ordinarily would not have occurred without negligence on someone's part.[10] When expert testimony was required to establish the defendant's negligence, however, instructions on res ipsa loquitur to the jury were usually refused, because the facts were beyond the knowledge of the layman.[11] California, though, reversed its stand on this point and did not hesitate to apply the doctrine of res ipsa loquitur even if the jury had to weigh medical expert testimony.[12] Yet the burden of proof has remained upon the plaintiff to establish every fact necessary to constitute his cause of action.[13]

The procedural effect of res ipsa loquitur instructions was to permit an inference of negligence. This placed the burden of exculpation upon the defendant physician, because he was the only one who had knowledge of all events during treatment or surgery. The plaintiff was helpless when asked to come forward with specific proof of negligence, because he is ignorant of medical technique and frequently rendered unconscious as in the case of surgery. Add to this situation the notorious reluctance of physicians to testify in court and it is easy to see why the plaintiff was frequently unable to meet the burden of proof.[14]

The defendant was required to balance the plaintiff's evidence by showing that he met the standards of medical care and skill that prevail in the community, or that other equally probable reasons may have caused the injury. If he satisfied this requirement, some jurisdictions took the case away from the jury because it was only a matter of speculation which one of two or more agencies was the proximate cause of the injury.[15]

---

[10] Tiller v. Von Pohle, 72 Ariz. 11, 230 P. 2d 213 (1951); Ybarra v. Spangard, 25 Cal. 2d 486, 154 P. 2d 687 (1944); Bower v. Olch, 120 Cal. App. 2d 108, 260 P. 2d 997 (1953); Ambrosi v. Monks, 85 A. 2d 188 (D.C. 1951); Johnston v. Rodis, *supra* note 9; Swanson v. Hill, 166 F. Supp. 296 (D.N.D. 1958); Frost v. Des Moines Still College of Osteopathy and Surgery, 248 Iowa 294, 79 N.W. 2d 306 (1956); Merker v. Wood, *supra* note 9; Sanders v. Smith, 200 Miss. 551, 27 So. 2d 889 (1946); Williams v. Chamberlain, *supra* note 9; Vonault v. O'Rourke, 97 Mt. 92, 33 P. 2d 535 (1934); Ayers v. Perry, 192 F. 2d 181 (3rd Cir. 1951); Terhune v. Margaret Hague Maternity Hosp., 63 N.J.S. 106, 164 A. 2d 75 (1960); Shearin v. Lloyd, 246 N.C. 363, 98 S.E. 2d 508 (1957); Robinson v. Wirts, 387 Pa. 291, 127 A. 2d 706 (1956); Donaldson v. Maffucci, 397 Pa. 548, 156 A. 2d 835 (1959); Meadows v. Patterson, 21 Tenn. App. 283, 109 S.W. 417 (1937); Johnson v. Ely, 30 Tenn. App. 294, 205 S.W. 2d 759 (1947); Olson v. Weitz, 37 Wash. 2d 70, 221 P. 2d 537 (1950); Nelson v. Murphy, 42 Wash. 2d 737, 258 P. 2d 472 (1953); Smith v. American Cystoscope Makers, Inc., 44 Wash. 2d 202, 266 P. 2d 792 (1954); Richison v. Nunn, 57 Wash. 2d 1, 340 P. 2d 793 (1959).

[11] Wallstedt v. Swedish Hosp., 220 Minn. 274, 19 N.W. 2d 426 (1945); Donaldson v. Maffucci, *supra* note 10; Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W. 255 (1963).

[12] Seneris v. Haas, 45 Cal. 2d 811, 291 P. 2d 915 (1955).

[13] Watterson v. Conwell, 258 Ala. 180, 61 So. 2d 690 (1952); Christian v. Wilmington General Hosp. Assoc., 50 Del. 550, 135 A. 2d 727 (1957); DiFilippo v. Preston, 53 Del. 539, 173 A. 2d 333 (1961); Bruce v. U.S., 167 F. Supp. 579 (S.D. Cal. 1958); Quick v. Thurston, 290 F. 2d 360 (D.D.C. 1961); Cummins v. Donley, 173 Kan. 463, 249 P. 2d 695 (1952); Bettigole v. Diener, *supra* note 9; Lane v. Calvert, *supra* note 9; Robin-

(Continued on next page)

Generally, however, the physician was not looked upon as an insurer of a cure or of favorable results, nor was he liable for an honest mistake in diagnosis or treatment.[16]

Post 1964 Decisions

This state of the law was disturbed by an Alaska case in 1964.[17] While removing the plaintiff's diseased thyroid gland the surgeon injured the nerve that serves the vocal cords. This changed the soft, feminine quality of the patient's voice into a harsh rasping one and reduced her breathing capacity considerably. The plaintiff's counsel showed that the operative report did not mention that part of the procedure that involved the injured nerve. The defendant was unable to recall any irregularities during surgery and asserted that he had used proper care throughout the operation. Moreover he introduced evidence that this type of injury is a risk inherent in surgery of this kind and occurs in up to 5% of these cases even when the proper degree of skill and care had been observed.

The trial court denied the plaintiff's request to give res ipsa loquitur instructions to the jury because the underlying questions were not within the common knowledge of the layman. The defendant won in the lower court.

The Supreme Court of Alaska reversed the judgment of the trial court, holding that a statistically known calculated risk of 5% nerve damage does not rule out negligence. The defendant's conduct was

---

(Continued from preceding page)

son v. Wirts, *supra* note 10; Donaldson v. Maffucci, *supra* note 10; Poor Sisters of St. Francis v. Long, 190 Tenn. 434, 230 S.W. 2d 659 (1950); Butler v. Molinski, 198 Tenn. 124, 277 S.W. 2d 448 (1955); Devereaux v. Smith, 213 S.W. 2d 170 (Tex. 1948); Marsh v. Pemberton, 10 Utah 2d 40, 347 P. 2d 1108 (1959).

[14] 82 A.L.R. 2d 1270 (1962); Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, *supra* note 9; Dietze v. King, 184 F. Supp. 944 (E.D. Va. 1960); Thomas v. Lobrano, 76 So. 2d 599 (La. 1954); Madis v. Stellwagen, 38 Wash. 2d 1, 227 P. 2d 445 (1951).

[15] Buchanan v. Downing, 74 N.M. 423, 394 P. 2d 269 (1964); Crawford v. County of Sacramento, 49 Cal. Rptr. 115 (1966).

[16] Piper v. Halford, 247 Ala. 530, 25 So. 2d 264 (1946); Harris v. Campbell, 2 Ariz. App. 351, 409 P. 2d 67 (1965); Adams v. Heffington, *supra* note 9; Christian v. Wilmington, *supra* note 13; Quick v. Thurston, *supra* note 13; Hine v. Fox, 89 So. 2d 13 (Fla. 1956); Gebhardt v. McQuillen, 230 Iowa 181, 297 N.W. 301 (1941); Mogensen v. Hicks, 253 Iowa 139, 110 N.W. 2d 563 (1961); Natanson v. Kline, 187 Kan. 186, 354 P. 2d 670 (1960); Voss v. Bridwell, 188 Kan. 643, 364 P. 2d 955 (1961); Lane v. Calvert, *supra* note 9; Johnson v. Colp, 211 Minn. 245, 300 N.W. 791 (1941); Sanders v. Smith, *supra* note 10; Hawkins v. McCain, 239 N.C. 160, 79 S.E. 493 (1954); Hunt v. Bradshaw, 242 N.C. 517, 88 S.E. 2d 762 (1955); Buchanan v. Downing, *supra* note 15; Modrzynski v. Lust, 55 Ohio L. Abs. 106, 88 N.E. 2d 76 (1949); Robinson v. Wirts, *supra* note 10; Donaldson v. Maffucci, *supra* note 10; Grantham v. Goetz, 401 Pa. 349, 164 A. 2d 225 (1960); Demchuk v. Bralow, 404 Pa. 100, 170 A. 2d 868 (1961); Quinley v. Cocke, 183 Tenn. 428, 192 S.W. 2d 992 (1946); Gravis v. Physicians and Surgeons Hosp. of Alice, 415 S.W. 2d 674 (Tex. 1967); Danville Community Hosp. v. Thompson, 186 Va. 746, 43 S.E. 2d 882 (1947); Nelson v. Murphy, *supra* note 10; Hart v. Steele, 416 S.W. 927 (Mo. 1967); Herbert v. Travelers Indem. Co., *supra* note 4; Bruce v. U.S., *supra* note 13.

[17] Patrick v. Sedwick, *supra* note 2.

below the standards of medical practice of his community and the plaintiff had established a prima facie case of malpractice. The application of the doctrine of res ipsa loquitur was therefore unnecessary. The written report of the surgery was considered a self-serving document and worthless, because the defendant was the only one present at the operation and because he himself made the determination that he had used every precaution.

In the following year the Supreme Court of California decided *Quintal v. Laurel Grove Hospital.*[18] Here, the anesthesiologist, who had just put a child to sleep in preparation for a minor eye operation, informed the surgeon that breathing and heart action had stopped, and asked him to perform open chest heart massage. Being an eye specialist, the surgeon felt unqualified to open the chest and rushed out of the operating room to look for assistance. He found a general surgeon who started the heart to beat again.

In such a situation seconds count. If the brain is without oxygen for more than three minutes irreversible injury to the nervous system is to be expected. This was exactly what happened. Brain damage rendered the child permanently and completely paralyzed, mute and blind.[19]

Experts testified on both sides during the trial. The plaintiff could show that the injury was caused by the physician's refusal to promptly perform open heart massage, and that the eye surgeon's conduct, therefore, fell below the medical standards of the community. The defendant showed that cardiac arrest, though rare, does occur even in the absence of negligence.

After refusing instructions on res ipsa loquitur to the jury, the trial court gave judgment for the defendant.

The Supreme Court of California held, however, that res ipsa loquitur would be applicable, since even laymen understand, that this type of injury is not commonly encountered as a consequence of eye surgery in the absence of negligence. The defendant was in exclusive control of the instrumentalities and circumstances at the critical time. Now the duty was upon him to balance the plaintiff's evidence and to show that his negligence was not the causative factor that led to this tragic result. The case was reversed and remanded. (It was settled out of court before the second trial.)

Thus a jury composed of laymen was credited with enough understanding to weigh complicated medical expert testimony.

In the same year the Supreme Court of Oregon ruled in the case of

---

[18] Quintal v. Laurel Grove Hosp., *supra* note 3.

[19] *Ibid.* The facts in the case indicate that by overlooking two danger signals the defendant's position was further weakened. The patient had fever on the evening before surgery and was overexcited immediately before the operation because of inadequate sedation which rendered him susceptible to cardiac arrest. There was also an unexplained erasure on the patient's hospital record correcting the temperature on the morning of surgery.

Mayor v. Dowsett.[20] Here during childbirth a spinal anesthetic was given to the patient and shortly afterwards her body was improperly positioned. She became completely and permanently paralyzed from the neck down, requiring artificial breathing for many months. She sued the physician for malpractice. Plaintiff's expert witnesses showed that in permitting the head to lie lower than her legs during spinal anesthesia, the drug ascended in her spinal canal and destroyed the motor nerves.

The defendant introduced considerable expert testimony showing that the injury could well have been caused by other conditions or by aggravation of a pre-existing illness during the stress of childbirth.

The plaintiff asked the trial court to instruct the jury on res ipsa loquitur. This was refused since the issues were outside the common knowledge of laymen. The defendant prevailed.

The Supreme Court of Oregon set this judgment aside and remanded the case. It was held that the expert testimony on behalf of the plaintiff showed that this injury was not to be expected when due care was observed in the administration of the anesthetic. Therefore, the inference may be allowed that the negligence of the physician caused the injury because the instrumentality was under his exclusive control. It was, then, for the jury to decide from the expert testimony whether it was more probable than not that the injury had been caused by negligence of the defendant physician.[21]

In 1966 the Louisiana Supreme Court decided *Herbert v. Traveler's Indemnity Company.*[22] At the trial it was established that the physician injured a nerve during spinal anesthesia causing suffering and serious impairment in the use of one leg.

The patient's expert witness showed that injury to the nerve root in the administration of spinal anesthesia falls below the professional standards of the community.

The defendant physician's expert witness testified that even if the physician exercises proper skill and care injury to spinal nerves does occasionally occur. The trial judge refused the plaintiff's request to give the jury instructions on res ipsa loquitur because the issues were beyond the common knowledge of laymen. Judgment was rendered for the defendant.

The Supreme Court of Louisiana held, however, that res ipsa loquitur would indeed be applicable if an untoward event occurs: ". . . where the complaint is not based on the failure to obtain satisfactory results, but is based on the charge that, . . . there occurred some untoward event, . . . from which there resulted something not ordinarily

---

[20] Mayor v. Dowsett, *supra* note 5.

[21] *Ibid.*

[22] Herbert v. Travelers Indem. Co., *supra* note 4 at p. 334.

found to result during such treatment or operation, the physician, . . . may be required to show that such unusual occurrence did not result from negligence on his part."

In 1966 the Supreme Court of Wisconsin decided *Beaudoin v. Watertown Memorial Hospital.*[23] Shortly after awakening from surgery on her female organs the patient complained of second degree burns on her buttocks. The burns caused her suffering and disability for six months after the operation. She sued the physician for malpractice.

The defendant entered expert testimony tending to prove that the injury was not due to his negligence but was more probably caused by an allergy or by diabetes. Defendant also contended that plaintiff had failed to show exactly when, how, and by what instrumentality the supposed burns had been caused, or whether they were caused by defendant's negligence. The plaintiff's request for jury instructions on res ipsa loquitur was denied because laymen were not capable to weigh expert testimony. The plaintiff failed.

The Supreme Court of Wisconsin reversed and ordered a new trial, saying that in certain res ipsa loquitur cases for medical malpractice plaintiffs will be relieved of the almost impossible onus of having to identify the precise instrumentality which caused the injury. It decided that the plaintiff was entitled to res ipsa loquitur instructions because laymen would be able to conclude as a matter of common knowledge that second degree burn blisters are not a common occurrence during this type of procedure if due care is observed. The alternative causes for the injury suggested by the defendant do not take away the benefit of res ipsa loquitur. The inference of negligence is left to the jury unless the defendant gives undisputable proof that negligence did not occur.

A recent California decision had similar overtones.[24] By an error in judgment the surgeon tied off one ureter during a procedure designed to remove the patient's womb. Serious complications followed requiring two more major operations and the eventual removal of one kidney.

At the malpractice suit expert testimony on behalf of the plaintiff showed that the tying off of a ureter does not occur when proper care is applied. The defendant showed that damage to the ureter is a recognized complication of this type of surgery even in the absence of negligence. Res ipsa loquitur instructions were refused by the trial court because the issues were beyond the knowledge of laymen and the defendant won. The Supreme Court of California held that from this expert testimony the jurors as reasonable men could have inferred that the injury was the kind that ordinarily does not occur in the absence of someone's

---

[23] Beaudoin v. Watertown Memorial Hosp., *supra* note 6.

[24] Tomei v. Henning, *supra* note 3.

negligence. This justifies a trial judge to give res ipsa loquitur instructions to the jury. The case was reversed and remanded.

In these six decisions important developments can be recognized that may well forecast a future trend in medical malpractice law—excusable errors of today may amount to actionable negligence tomorrow.[25]

Except for Alaska, these state Supreme Courts decided that the appearance of expert witnesses should not deprive the plaintiff of the benefit to try his case to a jury. Henceforth laymen of these states will be credited with enough knowledge to base a sound verdict upon complex medical facts. What are the reasons for this change in attitude? Some commentators explain it as an attempt to balance the equities during trial. It can readily be understood that the plaintiff has a Herculean task to prove the exact causes that led to his injuries because of his ignorance of medical technique. Moreover, he is rendered unconscious during surgery when the critical events occurred.[26]

Thus, the burden of proof is shifted to the defendant physician to show that he was not negligent or that the injuries were caused by agencies other than negligence. Surely he has better access to vital information than anyone else.[27] The defendant used to meet this burden by showing that the injury is statistically recognized as an inherent risk of surgery. At times he may have been worried by a lack of sympathy from the lower court, but most appeals courts used to rule that negligence had not been sufficiently proven.[28] In these recent decisions however, the appeals courts have remained unimpressed by medical statistics. They have pierced the fog of professional and scientific mystery by declaring that recognized calculated risks: (1) do not exclude negligence and; (2) do not deprive the plaintiff of the benefit of res ipsa loquitur instructions to the jury. One cannot help the impression that in at least two instances the courts showed outright contempt for statistics.[29] They seemed to interpret them rather as the incidence of culpable conduct than as events beyond medical control.

The courts are undoubtedly aware of the conflict of interests with which a physician is faced in the case of an untoward result. On the one side is his duty to the patient that obliges him to disclose all pertinent facts, even if he should incriminate himself. And, on the other side

---

[25] Mills, *op. cit. supra* note 1.

[26] Connor, 30 Rocky Mt. L. Rev. 231 (1958); Rubsamen, Res Ipsa Loquitur in California Malpractice Law—Expansion of a Doctrine to the Bursting Point, 14 Stan. L. Rev. 251 (1962).

[27] Bettigole v. Diener, *supra* note 9; Lane v. Calvert, *supra* note 9; Poor Sisters of St. Francis v. Long, *supra* note 13; Meyer v. St. Paul—Mercury Indem. Co., 225 La. 618, 73 So. 2d 781 (1953).

[28] Cavero v. Franklin, 36 Cal. 2d 301, 223 P. 2d 471 (1950).

[29] Patrick v. Sedwick, *supra* note 2; Quintal v. Laurel Grove Hosp., *supra* note 3.

is the desire to protect his reputation, his pocketbook, and to stay free from liability.[30]

The physician's task of exculpation is made more formidable yet by outright discrediting all evidence introduced by him. Operative report and other statements are held to be self-serving and worthless because he himself had made the determination that every precaution had been used.[31] Some jurisdictions feel that this attitude goes against the Anglo-American tradition of justice and fairness which holds the defendant innocent until proven guilty. Moreover, there is an unjustifiable threat to professional reputation involved by offering every disgruntled patient a fair chance to obtain a judgment against his physician.[32] For all practical purposes this amounts to imposing strict liability upon the medical profession: with medical statistics being discarded and the defendant's credibility reduced to the vanishing point, the physician is now supposed to exculpate himself.[33] How many juries will find that the defendant had met this burden well enough so as to absolve himself from negligence?

There may be other reasons for this new trend. The justices in three courts did not hesitate to show that they were deeply moved by the tragic results.[34] Maybe they felt that every patient should be compensated for grievous injuries following surgery regardless of the presence of negligence. This would amount to regression to the historic attitude that "in all civil acts, . . . the law doth not so much regard the intent of the actor, as the loss and damage of the party suffering." [35] To hold the physician liable where negligence has not been proven amounts to liability without fault. This concept is not new. "A bona fide purchaser of stolen goods is held liable for conversion; the publisher of a libel commits a tort, although he has no means of knowing the defamatory nature of his words." [36]

As it is tacitly understood that physicians carry malpractice insurance, these decisions seem to say: Let him carry the financial burden of disastrous results, who makes a living (and a profit) by performing those risky operations. This is the concept of the deeper pocket and sounds much like Workmen's Compensation Law: the financial burden is shifted to him who can best bear the loss.

---

[30] Louisell and Williams, Res Ipsa Loquitur—It's Future in Medical Malpractice Cases, 48 Calif. L. Rev. 252 (1960).

[31] Patrick v. Sedwick, *supra* note 2.

[32] Mills, *op. cit. supra* note 1; Louisell, *op. cit. supra* note 30.

[33] Naraghi, Res Ipsa Loquitur in California Malpractice Law: Quintal v. Laurel Grove Hospital, 18 Hastings L. J. 691 (1967); Rubsamen, *op. cit. supra,* note 26.

[34] Quintal v. Laurel Grove Hosp., *supra* note 3; Tomei v. Henning, *supra* note 3; Mayor v. Dowsett, *supra* note 5.

[35] Prosser, *op. cit. supra,* note 7, at 506.

[36] *Id.* at 507.

The physician is then not insured only for conduct that falls below professional standards in the community, but also for all the inherent risks in medical practice that are beyond his control. These new decisions make Justice Taft's words of 1897 sound prophetic: ". . . 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." [37]

Effect on Medical Profession

What effect will this new trend have upon the practice of medicine? Some observers feel that the doctrine of res ipsa loquitur is most appropriate to enforce the physician's duty toward his patient.[38] But no one could fail to see the impact of this attitude upon the medical profession to use only those procedures that pose the least threat of legal liability, regardless of their relative curative value. The Supreme Court of California expressed this concern itself in a 1962 decision: "To permit an inference of negligence under the doctrine of res ipsa loquitur solely because an uncommon complication develops would place too great a burden upon the medical profession and might result in an undesirable limitation on the use of operations or new procedures involving an inherent risk of injury even when due care is used." [39]

Others suggested that the doctrine of res ipsa loquitur should not be applied in cases of medical research, nor when the methods of treatment are still in a formative state.[40] This way it would not thwart medical advancement or deter doctors from employing new methods. Rulings of sympathy may become a deterrent to medical practice. Therefore, the exercise of the medical profession must remain subject to the fewest restrictions.[41]

The impact of these new decisions could be compared to the visible part of an iceberg—their greatest influence will be exerted upon numerous malpractice decisions on the nisi prius level, where they will remain mostly unnoticed.[42]

Recommendations

These problems are as old as the medical profession. There is little prospect for a quick solution. This writer believes that the basic difficulty lies in a monumental lack of communication and rapport between the medical and legal professions. But while the legal profession has

---

37 Ewing v. Goode, 78 F. 442 (6th Cir. 1897).

38 Louisell, *op. cit. supra* note 30; Naraghi, *op. cit. supra* note 33.

39 Siverson v. Weber, 57 Cal. 2d 834, 372 P. 2d 97 (1962) at 99.

40 Connor, *op. cit. supra* note 26.

41 Mills, *op. cit. supra* note 1.

42 Miller, Will You Be Held Liable for Bad Results?, Medical Economics, Nov. 13, 1967, at 66.

gone a long way to remedy the situation by acquiring medical knowledge as it applies to malpractice law, the medical profession has remained rather indifferent to the legal problems of their patients.

It is suggested that this inter-professional hiatus could be narrowed by the following steps:

1. Introduction of medico-legal courses into medical school curricula would point out to the future physicians that the duties to the patient do not end in the office or at the bedside in the hospital, but that there are legal aspects to their future work and that they have a duty to disclose to the patient who has been injured in the course of treatment or surgery, just what had happened and that this patient's rights can only be protected by the physician's willingness to co-operate with the legal process.

2. Qualified lawyers should offer themselves as speakers at the regular meetings of county medical societies to make physicians aware of their part in protecting a patient's rights.

3. Medical societies should be urged to establish panels of impartial medical experts who are willing to testify in malpractice cases in order to promote the administration of justice. This would free the medical profession of the stigma that the "conspiracy of silence" had cast upon it.

4. The attitude that local differences in medical practice could be prejudicial to the parties of malpractice litigations is rather antiquated and should be abandoned. There is nothing revolutionary about this suggestion: all specialists, e.g., after meeting nationally uniform requirements, are certified before national boards which are composed of eminent physicians from all parts of the country. Presently the local variations of medical practice in the United States are in most cases negligible and out-of-town experts could be invited to testify.

This is of great practical importance: in the same community there is always fear of economic and social retaliation since the physicians are interdependent. The atmosphere of anonymity created by out-of-town witnesses would avoid friction on the local level and enhance their willingness to testify against a colleague in order to help an injured patient.