



# RES IPSA LOQUITUR IN MEDICAL NEGLIGENCE CASES

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Does the doctrine of res ipsa loquitur apply to medical negligence cases where expert testimony is required to establish possible causes of an injury, and there may be more than one health care provider who was responsible for that injury? With some qualifications, the answer is yes. In general, res ipsa loquitur (literally, “the thing speaks for itself”) permits the finder of fact to infer both negligence and causation from the mere occurrence of an event if (1) the occurrence producing the injury is of a kind which does not ordinarily happen in the absence of someone’s negligence, (2) the injury is caused by an agency or instrumentality within the exclusive control of the defendant, and (3) the injury-causing occurrence was not due to any contribution on the part of the plaintiff. The doctrine casts upon the defendant the duty to come forward with an exculpatory explanation to rebut the presumption or inference of negligence on his or her part.

The Washington court has held that the doctrine of res ipsa loquitur applies to physicians and hospitals under appropriate circumstances.<sup>1</sup> Whether the doctrine of res ipsa loquitur applies in a particular case is a question of law<sup>2</sup> and depends upon the peculiar facts and circumstances of the individual case.<sup>3</sup> In general, there is more agreement as to the type of case to which res ipsa loquitur is applicable than as to its procedural effect when it is applied.<sup>4</sup>

Res ipsa loquitur relieves the plaintiff of the necessity of proving the defendant’s actual negligent act; however, the doctrine does not allow the jury to infer that a defendant was negligent from the mere fact of the injury alone.<sup>5</sup> Instead, the plaintiff must show that all three elements have been satisfied in order to benefit from the doctrine. Although the doctrine is relatively simple to state, its application has been a source of considerable confusion to the courts since its inception. The confusion is particularly apparent in medical negligence cases in which expert witnesses may be used and evidence of specific acts of negligence may be introduced.

The first element of res ipsa loquitur is satisfied if, “in the abstract,” there is a “reasonable probability” that the incident would not have occurred in the absence of negligence.<sup>6</sup> This element is often the weakest point of a medical negligence res ipsa loquitur case because the determination is generally made on the basis of “common knowledge,” and medical facts are often too complex to fall within that category.

To deal with that problem, Washington courts have followed what appears to be the prevailing view and ruled that expert testimony may be used in support of res ipsa loquitur in medical negligence cases.<sup>7</sup> Thus the

Washington courts have recognized three situations when the first element of res ipsa loquitur is satisfied:

*(1) when the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, and so forth, in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by experts in an esoteric field creates an inference that negligence caused the injuries.*<sup>8</sup>

In some cases, the lack of expert medical testimony has resulted in the plaintiff being denied the benefit of the doctrine. For example, in *Swanson v. Brigham*<sup>9</sup>, the court denied res ipsa loquitur to a fifteen year old plaintiff who died of asphyxiation while hospitalized for treatment of infectious mononucleosis. Admitting that the plaintiff’s death was unusual, the court found that the common experience of mankind does not suggest that death would be unexpected without negligence. Because there was no expert medical testimony to create an inference that negligence caused the injury, the court ruled that the first element of res ipsa loquitur was not met, and thus the doctrine was not available.

While the court in earlier cases ruled that res ipsa loquitur applies only when the circumstances leave no room for a different presumption,<sup>10</sup>

more recently the court has held that the plaintiff need not exclude every other possibility that the injury was caused other than by the defendant's negligence to be entitled to the benefit of the doctrine.<sup>11</sup> The conclusion that negligence is the most likely explanation of the injury or accident is not for the trial court to draw, or to refuse to draw, as long as the plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence and balance the probabilities. The inference of negligence is not required to be an exclusive or compelling one; it is enough that the court could say that reasonable persons could draw it.<sup>12</sup>

For example, in *Pederson v. Domouchel*<sup>13</sup>, the court held that the plaintiff, who suffered brain damage when he awoke from general anesthetic almost a month after undergoing jaw surgery, was entitled to the benefit of *res ipsa loquitur* even though he had been in a serious car accident prior to the surgery and could not rule out the possibility that his brain injury was due to the car accident rather than medical negligence.

Similarly, in *Douglas v. Bussabarger*<sup>14</sup>, *res ipsa loquitur* was permitted in an action against the defendant surgeon and drug manufacturer, even though the plaintiff could not pinpoint the cause of the paralysis and loss of sensation in her legs and lower trunk which she suffered after undergoing surgery to repair a stomach ulcer. Here again, the court noted that mankind's general experience and observation teaches that the harmful result probably would not occur in the absence of someone's negligence.<sup>15</sup> In addition, the court relied on expert medical testimony,

stating that within the "unique circumstances of medical malpractice cases", such expert testimony justifies application of the doctrine.

The medical expert testifying in *Bussabarger* set forth seven possible causes of the type of injury the plaintiff suffered. Although three of the possible causes were subsequently eliminated, all seven possible causes involved negligence on the part of the defendant. In contrast, the defendants suggested that the plaintiff's injuries were due to her idiosyncratic reaction to the anesthetic and not negligence. Faced with a situation in which there were four possible causes of the plaintiff's disability which would be the result of negligence and one possible cause of the disability which would be the result of some indefinite and amorphous abnormality, the court allowed the plaintiff the benefit of *res ipsa loquitur*. The court stated:

*Were we to hold otherwise, patients who suffer injury or disability while being operated upon will be unable to recover damages if the doctor merely alleges that a mysterious, unexpected, and unexplainable reaction by the patient to treatment took place on a single, isolated occasion, even though there is other medical testimony from which a jury could reasonably conclude that the doctor was in fact negligent.<sup>16</sup>*

Likewise, the court in *Horner v. Northern Pacific Beneficial Association Hospitals, Inc.*<sup>17</sup> held that testimony by medical experts as to the numerous ways in which traumatic injury to the brachial-plexus nerve might be caused under general anesthesia was sufficient to warrant *res ipsa loquitur*. In that case, the plaintiff's right arm was paralyzed when she awoke from anesthesia administered during a hysterectomy. The plaintiff was not required to

pinpoint the exact cause of the injury in order to benefit from *res ipsa loquitur* but instead needed only to present expert medical testimony that the injury was of traumatic origin which could have occurred in one of several ways while she was unconscious.

The second element of *res ipsa loquitur* is satisfied by showing that the plaintiff's injuries were caused by an agency or instrumentality within the exclusive control of the defendant. Usually the plaintiff must also demonstrate that he or she was in a position of corresponding lack of control to avoid the injury.<sup>18</sup> This element is easily met in medical negligence cases in which the plaintiff's injuries occurred during surgical operations while the plaintiff was unconscious.

The third element of *res ipsa loquitur* is satisfied by showing that the injury-causing accident or occurrence was not due to any voluntary action or contribution on the part of the plaintiff. Here again, this element is easily met when the injury-causing accident occurs during surgery while the patient is unconscious. Moreover, even in situations in which the plaintiff is conscious, courts have held medical practitioners accountable for injuries caused by the improper positioning of patients.<sup>19</sup>

Once all three elements of *res ipsa loquitur* have been satisfied, the jury is permitted to infer negligence on the part of the defendant in the absence of a satisfactory explanation in the circumstances of the case. The inference is permissible but not required, allowing the jury to make the inference or to refuse to do so.<sup>20</sup> A plethora of authorities suggest that the doctrine ought to be used sparingly and only



when justice makes its use essential.<sup>21</sup> On the other hand, the doctrine serves a useful purpose by throwing upon the party charged the duty of producing evidence which is practically accessible to him or her but inaccessible to the injured person.<sup>22</sup> As the court states in Younger v. Webster:

*It is difficult to justifiably disregard the application of the doctrine when a patient submits himself to the care and custody of medical personnel, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine, a patient who receives permanent injuries of a serious character, apparently the result of someone's negligence, would be unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the facts establishing liability.<sup>2</sup>*

Although the doctrine of res ipsa loquitur places a duty on the defendant to come forward with an exculpatory zovercoming the inference of negligence, the procedural application of the doctrine does not shift the burden of proof.<sup>24</sup> Instead, only the duty of going forward with the evidence shifts to the defendant. As the court in Douglas v. Bussabarger explains, the function of the doctrine of res ipsa loquitur is only to prevent a nonsuit, not to decide the case.<sup>25</sup> The defendant still has an opportunity to come forward with evidence as to exactly what did take place at the time the plaintiff was injured and thereby seek to avoid liability. Evidence presented by the defendant, however, must be clear and uncontradicted in order to dispel the inference. Evidence not rising to this standard, even if it is “weighty, competent and exculpatory”, will not dispel the inference but will merely generate an issue of fact for the jury to decide under proper instructions.<sup>26</sup>

When each of the elements of res ipsa loquitur are supported by substantial evidence, including an inference from expert medical testimony that negligence caused the injury to the patient, plaintiffs are entitled to a res ipsa loquitur instruction.<sup>27</sup>

Although there are no reported Washington cases which explicitly address the issue, res ipsa loquitur should be applicable against multiple defendants in medical cases if the defendants had concurrent control over the instrumentality causing the injury or if one or more defendants were responsible under the doctrine of respondeat superior for other defendants. These theories may be applied in res ipsa loquitur cases using traditional formulations.<sup>28</sup>

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FOOTNOTES

1. ZeBarth v. Swedish Hospital Medical Center, 81 Was. 2d 12, 18, 499 P.2d 1 ((1972); Douglas v. Bussabarger, 73 Wash. 2d 476, 438 P.2d 829 (1968); Leach v. Ellensburg Hosp. Ass'n, Inc., 65 Wash. 2d 925, 400 P.2d 611 (1965); Pederson v. Domouchel, 72 Wash. 2d 73, 431 P.2d 973 (1967); Horner v. Northern Pacific Beneficial Ass'n Hosps., Inc., 62 Wash. 2d 351, 382 P.2d 518 (1963); Nelson v. Murphy, 42 Wash. 2d 737, 258 P.2d 472 (1953).
2. Metropolitan Mortgage & Securities Co., Inc., supra note 2, at 244; Zukowsky v. Brown, 79 Wash. 2d 586, 488 P.2d 269 (1971); Pacific Coast R.R. v. American Mail Line, Ltd., 25 Wash. 2d 809, 813, 172 P.2d 226 (1946).
3. Adams v. Western Host, Inc., 55 Wash. App. 601, 606 (1989), quoting, Morner v. Union Pac. R.R., 31 Wash. 2d 282, 196 P.2d 744 (1948).
4. Siegler v. Kuhlman, supra note 1, at 234.
5. Miller v. Kennedy, 91 Wash. 2d 155, 159-60, 588 P.2d 734 (1978).

6. Marshall v. Western Air Lines, Inc., 62 Wash. App. 251, 259 (1991), citing, Calabretta v. National Airlines, Inc., 528 F.Supp. 32 (E.D. N.Y. 1981).
7. Brown v. Dahl, 41 Wash. App. 565, 580 (1985); ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 499 P.2d 1 (1972); Horner v. Northern Pac. Beneficial Ass'n Hosps., Inc., 62 Wash. 2d 351, 382 P.2d 518 (1963); Swanson v. Brigham, 18 Wash. App. 647, 649-50, 571 P.2d 217 (1977).
8. Brown v. Dahl, supra note 18, at 580 (cites omitted).
9. 18 Wash. App. 647, 571 P.2d 217 (1977).
10. See, e.g., Gardner v. Seymour, 27 Wash. 2d 802, 812, 180 P.2d 564 (1947)(the court, quoting from Quass v. Milwaukee Gas Light Company, suggested that when it is shown that the accident might have happened as the result of one of two causes, the reason for the res ipsa loquitur rule fails and it cannot be invoked).
11. Younger v. Webster, 9 Wash. App. 87, 93, 510 P.2d 1182 (1973), citing, Prosser, Res Ipsa Loquitur in California, 37 Cal. L. Rev. 183, 197-98 (1949).
12. Id., citing, Bauer v. Otis, 133 Cal. App.2d 439, 284 P.2d 133 (1955).
13. 7272 Wash. 2d 73, 431 P.2d 973 (1967).
14. 73 Wash. 2d 476, 438 P.2d 829 (1968).
15. Id. at 482.
16. Id. at 486.
17. 62 Wash. 2d 351, 361, 382 P.2d 518 (1963).
18. Jackson v. Criminal Justice Training Comm'n, 43 Wash. App. 827, 830-31, 720 P.2d 457 (1986).
19. Joan Teshima, Applicability of Res Ipsa Loquitur in Case of Multiple Medical Defendants--Modern Status, 67 A.L.R.4th 544, 584-85 (1989).
20. Vogreg v. Shephard Ambulance Service, 47 Wash. 2d 659, 289 P.2d 350 (1955); Pederson v. Domouchel, 72 Wash. 2d 73, 82, 431 P.2d 973 (1967).
21. Siegler v. Kuhlman, supra note 1, at 243-44 (cites omitted).
22. J. Wigmore, Evidence § 2509 (3d ed. 1940) at 382, quoted in, Younger v. Webster, supra note 24.
23. 9 Wash. App. 87, 94, 510 P.2d 1182 (1973).
24. Siegler v. Kuhlman, supra note 1, at 236.
25. 9 Wash. App. 87, 510 P.2d 1182 (1973).
26. Van Hook v. Anderson, 64 Wash. App. 353, 360, 824 P.2d 509 (1992); Brown v. Dahl, 41 Wash. App. 565, 582 (1985); ZeBarth v. Swedish Hosp. Medical Center, 81 Wash. 2d 12, 22, 499 P.2d 1 (1972).
27. Id. But see, Zukowsky v. Brown, 79 Wash.2d

586, 488 P.2d 269 (1971)(suggesting that res ipsa loquitur instructions should not be given and that the theory is adequately covered by a circumstantial evidence instruction).

28. See, Joan Teshima, *supra* note 40, at §§ 7, 8.

