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Medicolegal Sidebar The Law and Social Values: Res Ipsa Loquitur

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Introduction

In his book, *The Case Against the Supreme Court* [5], Erwin Chemerinsky JD, Dean of the University of California, Irvine School of Law, examines the legal decisions issued by the Supreme Court, and concludes that these decisions principally reflect the ideologies or values of the judges. Chemerinsky begins his

analysis with the 1927 legal case of *Buck v Bell* [3]. In his controversial majority opinion, Justice Oliver Wendell Holmes Jr. upheld a state statute that allowed involuntary sterilization of the “mentally unfit.” The *Buck* decision held that the societal value of protecting citizens from the offspring of the intellectually disabled took precedence over the reproductive rights of a group of men and women [3]. This holding is offensive by contemporary standards, but it reflects a

balancing of social interests that prevailed at the time.

In our previous Medicolegal Sidebar column [2], we described how the evolution of legal principles relevant to medical negligence, such as the doctrine called “loss of chance,” can reflect evolving societal priorities. Loss of chance addresses the tension between unfair verdicts arising from jury confusion and the need to compensate plaintiffs who merely lost some probability of survival, or the chance of obtaining a better outcome, because of medical negligence.

In this article, we will examine another legal doctrine of interest to physicians, *res ipsa loquitur*, which in Latin means “the thing speaks for itself.” Since this doctrine was applied to medical malpractice litigation, it has evolved in ways that will be relevant to clinical practice, and help mitigate medical malpractice risk.

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Shifted Burden of Proof

While many physicians may be familiar with *res ipsa loquitur*’s precise translation, its actual meaning can be

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confusing. Physicians may believe that this doctrine is synonymous with absolute liability. That is not so. In fact, only under a narrow set of circumstances can a court create a presumption of medical negligence such that the burden of proof is shifted to the defendant provider to prove that he/she was not negligent. If the defendant cannot successfully rebut the presumption of negligence at trial, the jury is left to calculate the damages claimed by the plaintiff. Applying *res ipsa loquitur* to medical negligence cases requires the plaintiff to demonstrate that the alleged injury cannot ordinarily occur unless there is medical negligence, and that the instrumentality causing the injury was always under the exclusive control of the defendant(s) during the relevant timelines of the case.

The general rule in US jurisprudence is that the accuser (the plaintiff) must bear the burden of proof in criminal and civil litigation. In medical malpractice cases, this means that the injured party must prove that the healthcare provider was negligent. The question arises whether there are any exceptions to this rule that might justify shifting that burden from the plaintiff to the defendant provider. *Res ipsa loquitur* was developed to address those exceptions, beginning with the 1944 legal case of *Ybarra v Spangard* [9].

Ybarra v Spangard

In late October 1939, Joseph Ybarra developed appendicitis and consulted the physician, Dr. Tilley, who planned to do an appendectomy. In the hospital, Mr. Ybarra remembered receiving a hypodermic injection by the anesthesiologist, after which he fell asleep, and remembered nothing further. During surgery, his body was positioned such that his upper back rested against two hard objects. Before surgery, he had no symptoms in his arms or shoulders, but after a successful appendectomy, Mr. Ybarra could not control his arm. It was determined that he suffered a serious, permanent neurologic injury from pressure on his brachial plexus [9].

Because Mr. Ybarra was unconscious during surgery, he could not say who had positioned him improperly. None of the doctors or nurses present in the operating room were forthcoming with that information, either. Since Mr. Ybarra could not sustain his burden of proof by pointing to a specific defendant who caused the injury, the circumstances created an absolute barrier to any legal relief for his damages. The *Ybarra* court addressed this impasse by shifting the burden of proof to the defendants, citing the *res ipsa loquitur* doctrine. This presumption of negligence was based on the assumption that the type of injury

suffered by Mr. Ybarra could not occur in the absence of negligence [9].

History and Legal Evolution of *Res Ipsa Loquitur*

In the nonmedical context, the doctrine of *res ipsa loquitur* originated in the 1863 British case of *Byrne v Boadle* [4], where a barrel of flour that fell out of the defendant's shop window struck the plaintiff. After examining the facts, the court concluded that there was no way that the barrel could roll out of the window without some negligence. The *Byrne* court held that the mere occurrence of that accident, constituted enough evidence for the plaintiff to avoid a nonsuit (that is, a dismissal of the claim) [1, 4].

The *Ybarra* decision is historically important since courts had been traditionally reluctant to apply *res ipsa loquitur* in medical malpractice cases. The reason for this reluctance was the first prong of the *res ipsa loquitur* test, which requires the plaintiff to demonstrate that the injury would not have occurred but for an act of medical negligence. Until *Ybarra*, courts had been skeptical whether it was ever possible for a jury to have sufficient knowledge to determine whether a medical outcome would not have occurred but for an act of negligence. As legal author Karyn Ablin

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summarized: "... whereas injuries from accidents involving falling flour barrels and the like are almost always attributable to the negligence of the person exercising control over the barrels, injuries in cases of alleged medical malpractice may result from a variety of causal agents other than the negligence of the defendant, such as the onset of disease or a preexisting medical condition [1]."

Ablin [1] also addressed a 1993 ruling that marked an evolution in the application of *res ipsa loquitur* to medical negligence – *Connors v University Associates in Obstetrics and Gynecology* [6]. In *Connors*, a patient underwent surgery to become pregnant, and unexpectedly woke up with a permanent neurologic injury to her leg [1, 6]. The legal controversy in the *Connors* case went beyond the *res ipsa loquitur* doctrine; the question before the court was whether the plaintiff could introduce supportive expert testimony to help the jury understand that the alleged injury could never occur in the absence of negligence. Defense counsel argued that the *res ipsa loquitur* doctrine applied only to cases where medical negligence was so obvious that it could be inferred from the nature of the injury itself. If this point of view were to have been upheld, expert testimony supporting the plaintiff would be unnecessary and prejudicial.

In a ruling that profoundly impacted medical malpractice cases resting on the *res ipsa loquitur* doctrine, the *Connors* court allowed the plaintiff to introduce expert testimony to educate the jury. The *Connors* ruling expanded the reach of the *res ipsa loquitur* doctrine. In addition to a presumption of negligence, a defendant physician now could encounter an adversarial peer in court who would tell the jury why the presumption of negligence applied to the facts of the case. The court held that the plaintiffs' use of expert testimony in support of their *res ipsa loquitur* claim would "bridge the gap between the jury's common knowledge and the uncommon knowledge of experts [1, 6]." The court also affirmed that the "experts can educate the jurors, essentially training them to be twelve new initiates into a different, higher level of common knowledge [1, 6]."

Discussion

Medical malpractice litigation is a component of tort law – the law that involves civil wrongdoing, as opposed to criminal acts. One purpose of tort law is the just distribution of accident losses (that is, the proper compensation of injury victims) [7]. Whether or not a court applies the doctrine of *res ipsa loquitur* can play an important role in achieving proper compensation

when patients are injured from errors that cannot be dismissed as expected complications of medical treatment. There is an increasing focus among stakeholders in the healthcare system to identify and address medical errors [8]. However, in the evolution of the *res ipsa loquitur* doctrine, courts have yet to define a bright line that separates a medical event that does not ordinarily happen in the absence of negligence, versus an event that is simply an unavoidable risk of treatment and occurs with a finite, though small, frequency. Historical case law is the best guide that exists in this regard.

A hypothetical case example can help illustrate the difficulty in applying the *res ipsa loquitur* doctrine. Consider a spine surgeon who performed a lumbar epidural injection for spinal stenosis in an outpatient surgery center. A few days following surgery, the patient developed severe paralysis and incontinence with no obvious explanation found on imaging studies. The syringes and vials of the drug could not be retrieved, and defendants testified that every step in the procedure had been properly done. Could this outcome have occurred absent a negligent act? If not, should an expert spinal surgeon be permitted to testify and educate the jury that a properly placed epidural steroid injection into the spine can never result in the adverse outcome that was encountered?

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As the law stands today, if an injured patient were to have no chance of recovery for injury under the circumstances above, the court could order the jury to accept a presumption of negligence on the part of the defendants. While seemingly unfair to the defendants, this is the best compromise reflected in the law between the competing ideals of allowing monetary recovery for inexplicable patient injury, and the cherished values of fairness and equity requiring the accusing party to bear the burden of proof in medical malpractice litigation. If *res ipsa loquitur* is applied too broadly, it can unfairly shift the burden of proof to the healthcare provider,

creating an unjust presumption of negligence. On the other hand, if the doctrine is too narrowly construed or eliminated entirely, innocent patients who are harmed by negligent acts may be barred from receiving any compensation for meritorious claims. As the case law and observations in this article point out, resolving these tensions is a daunting task.

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