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Torts--Res Ipsa Loquitur in Malpractice Cases, the Superior Knowledge Factor

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whether a condition of survival will be implied. From this it would appear that the *Stanford* case has abolished the nice distinctions between such phrases which the courts of this state previously found.

Having decided that there was nothing in the form or words of the dispositive clause itself from which to imply a condition of survival, the court next considered whether there was any controlling intent to be found from the family situation, the other provisions of the will, or the general testamentary scheme. The court concluded that upon examination of all factors present there was no evidence on which to base an implication of such a condition.

The dissent, on the other hand, felt that the testatrix' "affectionate concern" for the University "which to her stood as a monument to her deceased husband and her only son," showed a clear intent that the testatrix would not have wanted Walter to be able to substitute a stranger as recipient of one-third of a million dollars, and that she would have preferred the property to fall into the residue for the benefit of the University.[20]

It would appear that California has settled on the proper rule that a condition of survival to the time of distribution will not be implied merely because of the fact that the gift was to a class. Likewise, it would seem that the court properly held that no longer will a present or future construction of terms such as "shall belong and be delivered to" be deemed controlling in the determination of a testator's intent. However, the fact must not be lost sight of that in future cases it is still possible that an intent may be found in other language of the will, or even in extrinsic circumstances, which will imply such a condition of survival.

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TORTS — RES IPSA LOQUITUR IN MALPRACTICE CASES, THE SUPERIOR KNOWLEDGE FACTOR

The underlying purpose of the doctrine of res ipsa loquitur is to relieve the plaintiff of the burden of introducing evidence of specific acts of negligence in cases where the mere injury itself is indirect evidence of the defendant's negligence.[1] The elements of the doctrine are usually stated to be: 1. The accident is such that it would not ordinarily occur unless someone were negligent; 2. The instrumentality which caused the accident was under the control of the defendant; and 3. The plaintiff in no way contributed to the accident.[2] These three elements must be considered conjunctively since they say no more than the defendant was probably negligent. Take away any one of the elements and such an inference is no longer permissible.

By invoking the doctrine the plaintiff predicates his case on circumstantial evidence.[3] His case is neither weaker nor stronger than it would be if he were able to prove specific acts of negligence. Nor should the burden be any greater on the defendant by reason of the doctrine. The ultimate burden of proof does

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[20] *Supra* note 3, at ....., 315 P.2d at 699.

[1] Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 344 (1952); Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183 (1949).

[2] Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687 (1945); PROSSER, TORTS § 42 (2d ed. 1955).

[3] 38 AM. JUR., *Negligence* § 297 (1941).

not shift.[4] It is still plaintiff's task to make out a case from which the trier of fact may infer that negligence is the most likely explanation of the accident.[5]

However, Professor Wigmore in his work on evidence has said:

> "The particular force and justice of the rule . . . consists in the circumstances that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to [the defendant] but inaccessible to the injured person."[6]

This factor of superior knowledge has particular appeal in medical malpractice cases where the plaintiff is injured while lying prostrate and unconscious on the operating table.

> ". . . [I]t has been held that mere proof of a mistake or poor results does not itself prove malpractice, but where the injury is received while the patient is unconscious, the doctrine commonly is held to apply because under such circumstances the patient would not be able to testify as to what happened whereas the physician would."[7]

The plaintiff is usually ignorant of the precise breach of duty which led to his injury in malpractice cases either because he is unconscious or, though conscious, he is unable to interpret the events surrounding his injury. Nevertheless, it is logical for him to assume that when he finds a sponge in his abdomen following an operation,[8] or a tooth in his lung following an extraction[9] that someone has been negligent.

The difficulty arises in the less obvious cases where the injury is severe but the negligence is in doubt. Should the physician be forced to explain the cause merely because the injury is unusual and the plaintiff is under anesthesia? To this question the California District Court of Appeal in the recent case of *Salgo v. Stanford University Board of Trustees*[10] answered no.

In that case the plaintiff was given an aortography. For this operation a needle is injected past the spine and into the aorta. A solution is then injected into the aorta which allows an x-ray picture to show any block for the removal of which surgery may be necessary. Plaintiff was under a general anesthetic and when he awoke he was paralyzed from the waist down. The court held that the mere fact that plaintiff was under anesthesia and the result was somewhat rare did not present a situation for the application of the doctrine of res ipsa loquitur.[11] The court went on to say:

> "To apply the doctrine in every case where the patient is under anesthesia would put a hopeless burden on the medical profession. It must be remembered that the doctrine goes further than to require the doctor to explain what happened, as, of course, he will have to do to overcome the plaintiff's charge of negligence—it infers that he was negligent."[12]

What is the effect generally of superior knowledge in cases applying the doctrine of res ipsa loquitur? It is well settled in California that the plaintiff is not

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[4] Anderson v. I. M. Jameson Corp., 7 Cal. 2d 60, 59 P.2d 962 (1936); O'Connor v. Minnie, 169 Cal. 217, 146 Pac. 674 (1915).

[5] PROSSER, *op. cit. supra* note 1, at 194.

[6] 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940).

[7] HERZOG, MEDICAL JURISPRUDENCE § 187 (1931).

[8] Ales v. Ryan, 8 Cal. 2d 82, 64 P.2d 409 (1937); Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740 (1935).

[9] Whitestine v. Moravec, 228 Iowa 352, 291 N.W. 425 (1940).

[10] 154 Cal. App. 2d ....., 317 P.2d 170 (1957).

[11] *Id.* at ....., 317 P.2d at 176, 177.

[12] *Id.* at ....., 317 P.2d at 176.

precluded from relying on the doctrine though he allege specific acts of negligence.[13] The doctrine is not applicable, however, if the plaintiff knows as much or more of the cause of the accident as the defendant.[14] It is said that the cause of the accident must be unknown.[15] But this must mean unknown only to the plaintiff since the doctrine is still applicable though the defendant has no way of explaining the accident and is ignorant of its cause.[16]

The rule would seem to be then that the plaintiff must be ignorant of the cause of the accident or the doctrine will not apply. Such a negative proposition adds little to the law. Certainly if the plaintiff can explain the cause of the accident and the specific negligent acts of the defendant which caused it, he will have no need of the doctrine. If he is ignorant of the cause, it is not his ignorance that gives the doctrine its effect, but rather the very force of the argument that in the absence of the defendant's negligence the accident would not have occurred.

Nevertheless the courts continue to lay great stress on this factor particularly in malpractice cases. The following quote from the opinion in *Ybarra v. Spangard*[17] is illuminating.

> "We merely hold that where a plaintiff receives *unusual injuries while unconscious* and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."[18] (Emphasis added.)

If interpreted literally this statement would give an extremely broad effect to the doctrine of res ipsa loquitor since an unusual injury is not necessarily a negligently caused in jury. This particular statement was not necessary to the result in that case since there was ample evidence upon which to base an inference of negligence. (For effect of superior knowledge factor on control element in that case see below.)

Still the idea that a physician should explain an unusual injury whenever the plaintiff is unconscious is not without support. The dissenting opinions in *Farber v. Olkon*[19] and *Dees v. Pace*[20] indicate that the dissenting judges would hold that when the result is rare and the plaintiff is unconscious the doctrine should be applied.

In the *Farber* case,[21] the plaintiff suffered two broken legs as a result of a shock treatment for a mental condition. The court found that the hazard of such an injury was well recognized during shock treatments, and that the plaintiff had not introduced sufficient evidence to raise an inference of negligence. Justice

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[13] Leet v. Union Pacific R.R., 25 Cal. 2d 605, 155 P.2d 42 (1944); Mudrick v. Market St. Ry., 11 Cal. 2d 724, 81 P.2d 950 (1938); O'Connor v. Minnie, 169 Cal. 217, 146 Pac. 674 (1915); Jacob v. Key System, 140 Cal. App. 2d 357, 295 P.2d 569 (1956); Armstrong v. Wallace, 8 Cal. App. 2d 429, 47 P.2d 740 (1935).

[14] Billeter v. Rhodes, 104 Cal. App. 2d 137, 231 P.2d 93 (1951); Katoaka v. May Dept. Stores, 60 Cal. App. 2d 177, 140 P.2d 467 (1943).

[15] Keller v. Pacific Tel. & Tel., 2 Cal. App. 2d 513, 38 P.2d 182 (1935); Gritch v. Pickwick Stages System, 131 Cal. App. 774, 22 P.2d 554 (1933).

[16] Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 247 P.2d 344 (1952); Scott v. Burke, 39 Cal. 2d 388, 247 P.2d 313 (1952).

[17] 25 Cal. 2d 486, 154 P.2d 687 (1945).

[18] *Id.* at 494, 154 P.2d at 691.

[19] 40 Cal. 2d 503, 254 P.2d 521 (1953).

[20] 118 Cal. App. 2d 284, 257 P.2d 756 (1953).

[21] *Supra* note 19.

Carter issued a very strong dissent overlooking the element of calculated risk and said that the doctrine should be particularly applied when the plaintiff is unconscious and totally unable to explain what happened.

However, the courts are still reluctant to follow this view. They still generally require the plaintiff to show that the injury itself raises an inference that defendant was more probably negligent than not.[22] And this even though plaintiff was unconscious.[23]

The results of only two malpractice cases have been materially affected by the element of plaintiff's ignorance and defendant's alleged superior knowledge.

The first of these is the case of *Ybarra v. Spangard*.[24] Plaintiff here suffered an injury of traumatic origin to his shoulder sometime after being put under anesthesia for an appendectomy. He named as parties defendant all the doctors and hospital employees who could have possibly caused the injury. Not all of them could have been responsible either individually or under the doctrine of respondeat superior. Nevertheless, the court held the doctrine applicable to all. While it can be said that the injury indicated negligence on the part of someone this does not mean that the inference of negligence pointed to everyone. The control requirement was severely stretched.[25] The court was obviously influenced by the fact that plaintiff was unconscious and unable to name the party responsible. To require him to do so would be to take away his remedy. Here then the factor of superior knowledge played a very important part.

The other case is *Dierman v. Providence Hospital*.[26] The plaintiff was unconscious. The purpose of the operation was twofold. To remove a wart from the inside of his nose and to remove his tonsils. While the wart was being removed plaintiff was given an anesthetic of non-combustible nitrous oxide. For the tonsillectomy he was to be given ether which is highly combustible. While the incision in his nose was being cauterized with an electric needle there was a small explosion in his nasal passages. Several possible causes were advanced, among which was a possible impurity in the nitrous oxide. The impurity could have been introduced in the hospital or by the manufacturer. The jury found for the defendant in the trial court after hearing an instruction on res ipsa loquitur. The Supreme Court reversed for failure to produce the tank of nitrous oxide or an analysis of its contents. The court said:

> "We are constrained to the conclusion that in a res ipsa loquitur case where, in addition to the prima facie showing of negligence, it is admitted or appears beyond dispute that the defendant has it in his power to produce substantial evidence, material to the issue of negligence but fails to do so, it must be presumed that such evidence if produced would have been adverse to the defendant, and under such circumstances the evidence is insufficient to support a verdict for the defendant and the plaintiff is entitled to a directed verdict."[27]

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[22] Pink v. Slater, 131 Cal. App. 2d 816, 281 P.2d 272 (1955); Costa v. Regents of University of Calif., 116 Cal. App. 2d 445, 254 P.2d 85 (1953); Bennett v. Los Angeles Tumor Institute, 102 Cal. App. 2d 293, 227 P.2d 473 (1951).

[23] Dees v. Pace, 118 Cal. App. 2d 284, 257 P.2d 756 (1953); Farber v. Olkon, 40 Cal. 2d 503, 254 P.2d 521 (1953); Milias v. Wheeler Hospital, 109 Cal. App. 2d 759, 241 P.2d 684 (1952).

[24] *Supra* note 17.

[25] PROSSER, TORTS § 42 (2d ed. 1955).

[26] 31 Cal. 2d 290, 188 P.2d 12 (1947).

[27] *Id.* at 295, 188 P.2d at 14.