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Res Ipsa Loquitur in California Medical Malpractice Law--Quintal v. Laurel Grove Hospital

Wendell J. Naraghi

> of pain and also the nature of money. The problem of equating the two to afford reasonable and just compensation calls for a high order of judgment, and the law has provided no better yardstick for your guidance than your enlightened conscience. Your problem is not one of mathematical calculation, but involves an exercise of your sound judgment of what is fair and right, based on your common knowledge as individuals.[52]

An instruction such as that proposed, or any of the above arguments may be helpful to the defendant's counsel. But no argument or instruction yet devised seems to be capable of overcoming the effectiveness of the *per diem* argument which has proven itself to be one of the most successful courtroom techniques to have been advanced in personal injury cases. However, the defense has not rested, nor should it rest until a means is developed to overcome this inherently misleading form of argument which results in awards reached through illusory mathematical calculations rather than common sense and reason.

*Maurice R. Jourdane**

[52] The text of this instruction it taken partially from an instruction expressed in the Florida decision of Braddock v. Seaboard Air Line R.R., 80 So. 2d 662 (Fla. 1955) and partially from dicta in Beagle v. Vasold, 65 A.C. 161, 53 Cal. Rptr. 129, 417 P.2d 673 (1966).

* Member, Second Year Class.

RES IPSA LOQUITUR IN CALIFORNIA MEDICAL MALPRACTICE LAW—*QUINTAL V. LAUREL GROVE HOSPITAL*

The law of medical malpractice has not yet reached the stage of holding physicians and surgeons absolutely liable for every untoward result which may occur in their practice.[1] The injured plaintiff has the difficult task of proving negligence on the part of the doctor. He is often handicapped by the reluctance of doctors to testify against their brethren and usually has little knowledge of what actually transpired because of the inherent complexity of medical matters or because he was unconscious when the injury occurred.[2] The doctrine of *res ipsa loquitur* has proved to be an effective "instrument" in aiding the plaintiff to overcome these obstacles.[3]

[1] Clark v. Gibbons, 240 A.C.A. 776, 790, 50 Cal. Rptr. 127, 136 (1966). Some commentators believe the effect of *res ipsa* in California is to impose a rule of strict liability on the medical profession. See, *e.g.*, Adamson, *Medical Malpractice, Misuse of Res Ipsa Loquitur*, 46 MINN. L. REV. 1043 (1962).

[2] Judicial recognition of the obstacles which face the injured plaintiff is found in Salgo v. Leland Stanford Univ., 154 Cal. App. 2d 560, 568, 317 P.2d, 170, 175 (1957). Modern discovery procedure has helped the plaintiff to secure evidence but has not diminished the value of *res ipsa* to the injured patient. See Louisell & Williams, *Res Ipsa Loquitur-Its Future in Medical Malpractice*, 48 CALIF. L. REV. 252, 254 (1960).

[3] Louisell & Williams, *supra* note 2, at 255.

The *res ipsa* doctrine is simply one of circumstantial evidence which permits the jury to infer negligence from the mere occurrence of the accident itself when certain requirements are satisfied.[4] The usual procedural effect of *res ipsa* is to create an inference of negligence which is considered "permissive" since the jury need not draw the inference and may find for the defendant even though he remains silent.[5] In medical malpractice cases, however, because of the special relationship of doctor and patient the effect of the doctrine is to impose a mandatory burden upon the defendant to rebut the inference of negligence.[6] The effect in some cases is to shift the burden of proof to the doctor.[7]

In California *res ipsa loquitur* applies where (1) the accident is of such a nature that it can be said in the light of past experience that it was probably the result of negligence by someone and (2) the defendant is probably the person who is responsible.[8] This is a modern restatement of the first traditional requirement of *res ipsa* that the accident must be of the type which does not ordinarily occur in the absence of someone's negligence and of the second traditional requirement that the defendant must be in the exclusive control of the instrumentality causing the injury.[9] An erosion of the exclusive control requirement in the field of medical malpractice occurred relatively early.[10] Nevertheless, the requirement is by no means immaterial today as the plaintiff must show where the

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[4] Prosser, *Res Ipsa Loquitur in California*, 37 CALIF. L. REV. 183, 191 (1949).

[5] Professor Prosser maintains that the doctrine in the usual case produces only an inference of negligence and enables the plaintiff to at least get to the jury. Prosser, *supra* note 4, at 234. It appears that California courts speak of the effect in terms of presumption which would indicate that the defendant must offer some type of explanation or lose his case. Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 688, 268 P.2d 1041, 1044 (1954). Under the new Evidence Code presumptions are no longer evidence; they are assertions of fact required by law. CAL. EVIDENCE CODE § 600. Under CAL. EVIDENCE CODE § 603 the *res ipsa* presumption would be considered as one merely effecting the burden of producing evidence. See Witkin, Evidence § 264 (2d ed. 1966). Thus, the defendant must rebut the plaintiff's case by introducing evidence that would support a finding that he was not negligent. See WITKIN, EVIDENCE § 270 (2d ed. 1966).

[6] Dierman v. Providence Hosp., 31 Cal. 2d 290, 295, 188 P.2d 12, 15 (1947); Gerhardt v. Fresno Medical Group, 217 Cal. App. 2d 353, 360, 31 Cal. Rptr. 633, 638 (1963).

[7] *E.g.*, Salgo v. Leland Stanford Univ., 154 Cal. App. 2d, 560, 317 P.2d 170 (1957). Some argue that such a shift is justified on grounds of simplicity, the moral obligation of the doctor to disclose pertinent information and the special responsibility of the doctor toward his patient. Prosser, *supra* note 4, at 223. Louisell & Williams, *supra* note 2, at 255-256.

[8] Siverson v. Weber, 57 Cal. 2d 834, 836, 372 P.2d 97 (1962); Zentz v. Coca Cola Bottling Co. 39 Cal. 2d 436, 446, 247 P.2d 344, 349 (1952).

[9] 9 WIGMORE, EVIDENCE § 2509 (3d ed. 1940). The third element of the traditional *res ipsa* scheme, namely that the plaintiff did not voluntarily contribute to his injury, is usually not important in medical malpractice cases. Rubsamen, *Res Ipsa Loquitur in California Medical Malpractice Law—Expansion of a Doctrine to the Bursting Point*, 14 STAN. L. REV. 251, 252 (1962).

[10] In the famous case of Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 436 (1944) the "exclusive control" idea gave way because multiple defendants were each held to have the "right of control."

responsibility for the injury probably lies.[11] Most of the recent controversy, however, concerns *res ipsa's* first requirement.[12]

It is settled in California and a minority of jurisdictions that the jury may use either their own knowledge and experience or expert testimony as a basis for concluding that the accident is of such a nature that it was probably the result of negligence.[13] Traditionally, *res ipsa* applies where lay common knowledge and experience would dictate that the mere occurrence of the accident was indicative of negligence.[14] In medical malpractice, a highly technical area, lay common knowledge may be utilized to satisfy the first requirement of *res ipsa* in certain cases. Common cases include objects left in the patient's body at the time of surgery and the removal of the wrong part of the body when another part was intended.[15] The realm of lay common knowledge naturally grew,[16] but not without limits[17] or adverse comment.[18] Most jurisdictions confine *res ipsa* in medical mal-

[11] Inouye v. Black, 238 Cal. App. 2d 31, 47 Cal. Rptr. 313 (1965), 17 HASTINGS L.J. 359.

[12] Note, 38 So. CAL. L. REV. 740, 742 (1965).

[13] In Siverson v. Weber, 57 Cal. 2d 834, 836, 372 P.2d 97, 98 (1962) the court put to rest any doubts as to the availability of expert testimony in a medical malpractice *res ipsa* case by overruling a statement in *Engelking v. Carlson*, 13 Cal. 2d 216, 221, 88 P.2d 695, 698 (1939) that *res ipsa* only applied where a layman is able to say as a matter of common knowledge that the injury would not have occurred absent negligence. Other jurisdictions have also allowed expert testimony to be employed. *E.g.*, Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963); Horner v. Northern Pac. Beneficial Ass'n Hosp., 62 Wash. 2d 351, 382 P.2d 518 (1963).

[14] Prosser, *supra* note 4, at 191.

[15] *E.g.*, Inouye v. Black, 238 Cal. App. 2d 31, 47 Cal. Rptr. 313 (1965); Thompsen v. Burgeson, 26 Cal. App. 2d 235, 79 P.2d 136 (1938). See also LOUISELL & WILLIAMS, TRIAL OF MEDICAL MALPRACTICE CASES § 14.06 (1960). Relatively recent cases in which the injury was held to be within the realm of lay common knowledge include; Davis v. Memorial Hosp., 58 Cal. 2d 815, 376 P.2d 561 (1962) (infection following enema); Ragusano v. Civic Center Hosp. Foundation, 199 Cal. App. 2d 586, 19 Cal. Rptr. 118 (1962) (paralysis of leg following routine child birth).

[16] LOUISELL & WILLIAMS, *supra* note 15, § 14.02.

[17] The courts have held that the nature of the following injuries are beyond the realm of lay common knowledge: Siverson v. Weber, 57 Cal. 2d 834, 372 P.2d 97 (1962) (fistula following a hysterectomy); Campos v. Weeks, 245 A.C.A. 707, 53 Cal. Rptr. 915 (1966) (shock following injection of penicillin); Clark v. Gibbons, 240 A.C.A. 776, 50 Cal. Rptr. 127 (1966) (premature wearing off of local anesthetic and resulting complications); Crawford v. County of Sacramento, 239 Cal. App. 2d 791, 49 Cal. Rptr. 115 (1966) (cardiac arrest while patient under anesthesia); Edelman v. Ziegler, 233 Cal. App. 2d 871, 44 Cal. Rptr. 114 (1965) (cardiac arrest while patient under anesthesia); LaMere v. Goren, 233 Cal. App. 2d 799, 43 Cal. Rptr. 89 (1965) (paralysis following injection of novacaine); Salgo v. Leland Stanford Univ., 154 Cal. App. 2d 560, 317 P.2d 170 (1957) (paralysis following aortography).

[18] In 14 STAN. L. REV. 251, 276 (1962) the author strongly criticized the notion expressed in Wolfsmith v. Marsh, 51 Cal. 2d 832, 337 P.2d 70 (1957) that "It is a matter of common knowledge among laymen that injections in the arm, as well as other portions of the body do not ordinarily cause trouble unless unskillfully done or there is something wrong with the serum." *Id.* at 835, 337 P.2d at 72. A retreat from *Marsh* is found in the following cases involving injections where the court held that lay com-

practice to cases involving blatant medical errors because lay knowledge can be utilized in these situations.[19] California, however, in a complex medical situation where the matter lies beyond the pale of lay common knowledge, allows expert testimony.[20] In this situation, the jury can apply the doctrine only if there is evidence that it is common knowledge among experts that a given injury would not occur absent negligence.[21] In the esoteric area of medical causation much confusion exists concerning the nature of the evidence which is sufficient for laying a foundation for *res ipsa.*

Quintal v. Laurel Grove Hospital

Quintal v. Laurel Grove Hospital[22] is the latest California Supreme Court decision in which the doctrine of *res ipsa loquitur* is applied to medical malpractice. The plaintiff, a youth of six, entered the defendant hospital for the purpose of having an eye condition corrected by a minor operation. During the administration of the anesthetic and before surgery had commenced the plaintiff suffered a cardiac arrest. The defendant ophthalmologist considering himself incompetent to perform a thoracotomy rushed out of the operating room where he luckily encountered a surgeon who performed the operation and restored the heart action. The outcome was tragic since the youth suffered severe brain damage as a consequence of the lack of oxygen and blood to his brain during the arrest.

The trial court had granted judgment for the defendants notwithstanding the verdict. The appellate court affirmed this decision.[23] The supreme court reversed and concluded that, independently of the doctrine of *res ipsa,* there was evidence sufficient to sustain a verdict for plaintiff.[24] The significance of the opinion, however, was the decision that the jury on retrial should be instructed on *res ipsa.*[25] Chief Justice Traynor, in a concurring opinion, disagreed with the majority view that a *res ipsa* instruction would be proper, although he did admit that there was sufficient evidence to permit a finding of negligence independent of *res ipsa.*[26] Justice McComb dissented on the basis of the district court's opinion that *res ipsa* was not applicable and that there was a lack of evidence of negligence independent of *res ipsa.*[27]

Quintal was an "expert *res ipsa*" case. That is, expert testimony was necessary

mon knowledge could *not* be utilized: Campos v. Weeks, 53 Cal. Rptr. 915, 245 A.C.A. 707 (1966) (shock following an injection of penicillin); Surabian v. Lorenz, 229 Cal. App. 2d, 462, 40 Cal. Rptr. 410 (1964) (adverse reaction to a mandibular injection of an anesthetic).

[19] See cases collected in Annot., 82 A.L.R.2d 1262 (1962).

[20] Siverson v. Weber, 57 Cal. 2d 834, 372 P.2d 97 (1962).

[21] "The more esoteric kinds of medical causation demand expert testimony." Inouye v. Black, 238 Cal. App. 2d 31, 47 Cal. Rptr. 313 (1965). Attorneys have also recognized the need for an expert in this situation. 7 BELLI, TRIAL AND TORT TRENDS 201 (1962).

[22] 62 Cal. 2d, 154, 41 Cal. Rptr. 577, 397 P.2d 161 (1964).

[23] Quintal v. Laurel Grove Hosp., 38 Cal. Rptr. 749 (1964).

[24] Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 160, 41 Cal. Rptr. 577, 582, 397 P.2d 161, 166 (1964).

[25] Justice Mosk would have reversed the order granting the defendant's a new trial. *Id.* at 169, 41 Cal. Rptr. 586, 397 P.2d at 170 (concurring opinion).

[26] *Id.* at 170, 41 Cal. Rptr. at 587, 397 P.2d at 171 (concurring opinion).

[27] *Id.* at 175, 41 Cal. Rptr. at 590, 397 P.2d at 164 (dissenting opinion).

to lay a foundation for the doctrine since the possible causes of cardiac arrests were not a matter of common knowledge.[28] The plaintiff did not produce independent expert witnesses, but relied upon the cross examination of defendants themselves and their expert witnesses.[29] Unlike some cases,[30] in which the medical expert witness admitted that the injury was not only rare but usually would not occur in the absence of negligence, there was no expert testimony that when a cardiac arrest does occur under similar circumstances negligence is more probably than not the cause.[31] The majority failed to consider the lack of such testimony as fatal and allowed the instruction of *res ipsa* on the basis of direct evidence of negligence elicited from the defendants and their witnesses.[32] The decision to operate in a non-emergency situation when the patient had fever and was agitated and the surgeon's lack of ability to perform a thoractomy or his failure to at least have another surgeon present in case of an emergency are examples of *specific* negligent acts present in the case, which would support a finding of negligence.[33] According to Chief Justice Traynor the majority misplaced its reliance on such evidence as a basis for the *res ipsa* instruction.[34] Furthermore, he referred to expert testimony that when due care is exercised cardiac arrests do not ordinarily occur. This type of testimony, he said, established only that a cardiac arrest is a rare occurrence and nothing more.[35]

The majority admitted that a cardiac arrest was a calculated risk in the giving of a general anesthetic.[36] However, after noting that the injury was rare the court disregarded the calculated risk issue and held that since proof of specific negligent acts was present a *res ipsa* instruction would be proper.[37] The majority in *Quintal* apparently sanctioned an erroneous conception of *res ipsa loquitur* which found expression in earlier cases.[38] According to *Quintal* a plaintiff who suffers a rare injury will be entitled to a *res ipsa* instruction in addition to his prima facie case based on specific negligence notwithstanding that the risk of the injury is considered to be inherent or calculated.[39] Such a conclusion in effect

[28] *Id.* at 170, 41 Cal. Rptr. at 587, 397 P.2d at 171 (concurring opinion).

[29] *Id.* at 159, 41 Cal. Rptr. at 580, 397 P.2d at 164. The plaintiff may cross examine the defendant doctor and his expert witnesses in order to lay the necessary foundation for *res ipsa*. See Costa v. Regents of Univ. of Cal., 116 Cal. App. 2d 445, 254 P.2d 85 (1953).

[30] *E.g.*, Seneris v. Haas, 45 Cal. 2d 811, 819, 291 P.2d 915, 919 (1955).

[31] Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 171, 41 Cal. Rptr. 577, 587, 397 P.2d 161, 171 (1964) (concurring opinion).

[32] *Id.* at 164, 41 Cal. Rptr. at 583, 397 P.2d at 166.

[33] *Id.* at 161, 41 Cal. Rptr. at 582, 397 P.2d at 166.

[34] *Id.* at 171, 41 Cal. Rptr. at 587, 397 P.2d at 171 (concurring opinion).

[35] *Ibid.*

[36] *Id.* at 160, 41 Cal. Rptr. at 582, 397 P.2d at 166.

[37] *Id.* at 164, 41 Cal. Rptr. at 583, 397 P.2d at 166.

[38] Salgo v. Leland Stanford Univ., 154 Cal. App. 2d 560, 317 P.2d 170 (1957); Wolfsmith v. Marsh, 51 Cal. 2d 832, 337 P.2d 70 (1959). See generally Rubsamen, *Res Ipsa Loquitur in California Medical Malpractice Law—Expansion of a Doctrine to the Bursting Point*, 14 STAN. L. REV. 251 (1962).

[39] In Edelman v. Zeigler, 233 Cal. App. 2d 871, 44 Cal. Rptr. 114 (1965) the court observed that in *Quintal* a "combination of rarity and particular acts produced the court's conclusion that a res ipsa loquitur instructions should have been given." *Id.* at 882, 44 Cal. Rptr. at 122.

eliminates the first requirement of *res ipsa* in medical malpractice. In a state where plaintiffs in medical malpractice actions rely on the doctrine often,[40] the law of *res ipsa* in light of *Quintal* should be examined.

Specific Evidence of Negligence as a Foundation for Res Ipsa Loquitur

It is established that a *res ipsa loquitur* case is a circumstantial evidence case which permits the jury to infer negligence from the mere occurrence itself.[41] Proof of specific acts of negligence should be disregarded in deciding whether or not a *res ipsa* instruction should be given.[42]

> In other words, in a res ipsa case the ultimate fact, *some kind of negligence* is inferred without any evidential facts except the unusual occurrence itself; while in a specific negligence case there must be evidential facts sufficient to show some negligent acts or omissions which were the proximate cause of the occurrence.[43]

Chief Justice Traynor noted that the majority in *Quintal* relied on specific acts of negligence (such as the delay in performing the thoractomy) as a basis for the application of *res ipsa.*[44] He, however, observed that it is irrelevant that

> there may be facts other than the occurrence itself to suggest that the arrest was caused by negligence. Although such facts, if present, might be independent proof of negligence, they have no bearing on the question whether the jury should be permitted to draw an inference of negligence on the happening of the cardiac arrest alone.[45]

In a complex medical malpractice case where the causes of the injury are beyond the pale of lay common knowledge the jury is usually instructed:

> whether the injury is one which ordinarily does not occur in the absence of negligence is to be determined from the evidence presented in this trial by physicians and surgeons called as expert witnesses.[46]

Obviously, the only testimony referred to is that having a bearing on the issue of whether in light of the expert's past experience the mere happening of a certain injury is indicative of negligence. According to Chief Justice Traynor the only question relevant in *Quintal* was whether or not evidence had been offered by expert testimony that when cardiac arrests do occur, they are more probably than not caused by negligence.[47]

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[40] California far surpasses any other state in the total number of *res ipsa* medical malpractice cases. See Note, 60 MICH. L. REV. 1153, 1157 (1962).

[41] Prosser, *supra* note 4, at 191.

[42] "[I]n considering the propriety of the res ipsa loquitur instructions we have, of course, disregarded the direct evidence of negligence " Stanford v. Richmond Chase Co., 43 Cal. 2d 287, 293, 272 P.2d 764, 767 (1954) (nonmalpractice case). In Dees v. Pace, 118 Cal. App. 2d 284, 257 P.2d 756 (1953) (malpractice case) the court observed that an alleged admission by the doctor that the needle went into the bladder "would be evidence of a specific act of negligence and would not afford a basis for the giving of instructions on res ipsa loquitur." *Id.* at 290, 257 P.2d at 759.

[43] Harke v. Haase, 335 Mo. 1104, 75 S.W.2d 1001, 1004 (1934).

[44] Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 171, 41 Cal. Rptr. 577, 587, 397 P.2d 161, 171 (1964) (concurring opinion).

[45] *Ibid.*

[46] BOOK OF APPROVED JURY INSTRUCTIONS, 214 W

[47] Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 171, 41 Cal. Rptr. 577, 587, 397 P.2d 161, 171 (1964) (concurring opinion).

Quintal was not the first decision to allow a *res ipsa* instruction to be based upon a showing of particular deviations from the degree of skill ordinarily exercised by physicians and surgeons in the community. In *Wolfsmith v. Marsh*[48] a *res ipsa* instruction was allowed on the basis of evidence indicating a specific negligent act, namely the giving of an injection into a varicose vein. In *Salgo v. Leland Stanford University*[49] the plaintiff's expert witnesses testified that the needle was inserted into the wrong location, but none of the witnesses testified that paralysis would not ordinarily occur in the performance of an aortography unless someone had been negligent.[50] A *res ipsa* instruction was nevertheless given.

Recent California appellate court decisions have also followed *Quintal*. In *LaMere v. Goren*[51] an injection of novacaine resulted in the paralysis of plaintiff's arm. Expert testimony was introduced that the needle was too large and that an injection of novacaine under the circumstances was not good medical procedure in the community.[52] The court admitted that none of the medical witnesses stated that this is the type of injury which ordinarily does not occur in the absence of negligence.[53] But since the plaintiff had made a prima facie showing of negligence based on direct evidence of negligence he was given the benefit of the doctrine. In *Edelman v. Zeigler*[54] the plaintiff suffered a cardiac arrest during the course of a laparotomy. A *res ipsa* instruction was given notwithstanding defendant's contention that expert testimony was not related to the general proposition that such arrests do not ordinarily occur in the absence of negligence,[55] but was related to specific asserted negligence, namely the failure to bag feed.[56]

In other recent California appellate court decisions[57] the courts were impressed by the lack of direct evidence of negligence and on that ground refused to grant a *res ipsa* instruction.

Quintal has not made a significant change in medical malpractice law. Since the plaintiff has established a prima facie case based on specific acts of negligence *res ipsa* in many cases is no great boon to him. However, in some cases where the specific evidence of negligence is weak[58] the plaintiff will indeed reap bene-

[48] 51 Cal. 2d 832, 337 P.2d 70 (1959).

[49] 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

[50] "There was no medical testimony upon which res ipsa loquitur could be based unless it be Dr. Edmeads' testimony that the needle may have been inserted in the wrong place." *Id.* at 571, 317 P.2d at 177.

[51] 233 Cal. App. 2d 799, 43 Cal. Rptr. 898 (1965).

[52] *Id.* at 809, 43 Cal. Rptr. 900.

[53] *Id.* at 810, 43 Cal. Rptr. at 904.

[54] 233 Cal. App. 2d 871, 44 Cal. Rptr. 114 (1965).

[55] *Id.* at 882, 44 Cal. Rptr. 121.

[56] Bag feeding is squeezing the breathing bag by hand.

[57] Crawford v. County of Sacramento, 239 Cal. App. 2d 791, 798, 49 Cal. Rptr. 115, 120 (1966); Clark v. Gibbons, 240 A.C.A. 776, 789, 50 Cal. Rptr. 127, 135 (1966). Both of these cases were similar to *Quintal* in that they involved an unfortunate result following the administration of an anesthetic. The *Clark* case has been granted a hearing by the California Supreme Court.

[58] In Tomei v. Henning, 248 A.C.A. 151, 56 Cal. Rptr. 356 (1967) the court held that the injured plaintiff was entitled to a *res ipsa* instruction on the basis of medical testimony indicating only one asserted act of negligence (the doctor's failure to locate and the tying off of the ureters while performing a hysterectomy). Justice Draper, in a vigorous dissent, considered the court's application of *res ipsa* based on the evidence of

fits under the *Quintal* doctrine. He will be able to "tack" a *res ipsa* instruction onto an alleged act of negligence and then force the doctor to either come forward with an explanation or compensate the plaintiff for his injuries.

Rarity v. Calculated Risk

The first requirement of *res ipsa loquitur*, namely that the accident be of a kind which does not ordinarily occur absent negligence, was satisfied at one time in California by a mere showing that the injury rarely occurred.[59] The fact that a particular injury ordinarily did not occur was considered proof that when such injury did occur it was probably caused by negligence.[60] Thus, the rarity of the injury was deemed an adequate substitute for lay common knowledge and expert testimony. Such judicial reasoning did not escape criticism[61] and in *Siverson v. Weber*[62] the California Supreme Court apparently retreated from the rarity principle.

Siverson involved a fistula following a hysterectomy. The court noted that fistulas may occur even though the surgeon was not at fault.[63] In other words, the injury was considered to be an inherent or calculated risk of the operation which could not be diminished by the exercise of due care.[64] The court recognized that the development of a fistula is also a rare occurrence but dismissed the importance of the rarity of the injury:

> The fact that a particular injury suffered by a patient is something that rarely occurs does not in itself prove that the injury was probably caused by the negligence of those in charge of the operation. Where risks are inherent in an operation and an injury of a type which is rare does occur, the doctrine should not be applicable unless it can be said that, in the light of past experience, such an occurrence is more likely the result of negligence than some cause for which the defendant is not responsible.[65]

The *Quintal* court apparently revived the rarity principle and disregarded the calculated risk principle. The court admitted that a cardiac arrest is a known and calculated risk in the giving of a general anesthetic.[66] But the court concluded that since the arrest "could occur as a result of negligence" and the occurrence of an arrest is rare a *res ipsa* case was established.[67] The decision in effect eliminated the inherent risk principle in medical malpractice cases because expert testimony

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one mere alleged act of negligence to be a "misuse of res ipsa." *Id.* at 157, 56 Cal. Rptr. at 360. See Edelman v. Ziegler, 233 Cal. App. 2d 871, 44 Cal. Rptr. 114 (1965).

[59] Rubsamen, *supra* note 38, at 270.

[60] Cavero v. Franklin Gen. Benevolent Socy, 36 Cal. 2d, 301, 314, 223 P.2d 471, 479 (1950) (dissenting opinion by Chief Justice Traynor).

[61] Comment, *Siverson v. Weber—A Reconsideration of Res Ipsa Loquitur in Medical Malpractice*, 15 STAN. L. REV. 77 (1963).

[62] 57 Cal. 2d 834, 372 P.2d 97 (1962).

[63] *Id.* at 837, 372 P.2d at 98.

[64] Comment, *Siverson v. Weber—A Reconsideration of Res Ipsa Loquitur in Medical Malpractice*, 15 STAN. L. REV. 77 (1963).

[65] Siverson v. Weber, 57 Cal. 2d 834, 839, 372 P.2d 97, 99 (1962).

[66] Quintal v. Laurel Grove Hosp., 62 Cal. 2d 154, 160, 41 Cal. Rptr. 577, 582, 397 P.2d 161, 166 (1964).

[67] *Id.* at 164, 41 Cal. Rptr. at 583, 397 P.2d at 166.

that an injury could occur without negligence is of no value so long as the injury is rare and *might* occur as a result of negligence.[68]

Special Relationships and Res Ipsa

The majority in *Quintal* concluded that the plaintiff was entitled to a *res ipsa* instruction notwithstanding (1) the absence of a basis of experience, either common to the community or established by an expert, that when injury does occur it is probably the result of negligence and (2) evidence that the injury is an inherent risk in the particular medical transaction. The court in effect disregarded the first requirement of *res ipsa* in a medical malpractice case, but this result is not surprising in light of other recent developments in the law of *res ispa.*

In *Fowler v. Seaton*[69] a young boy sustained serious head injuries while playing in the defendant's nursery school playground. The California Supreme Court applied *res ipsa* apparently even in the absence of a showing that the injury was probably caused by negligence.[70] The court stressed that the defendant owed a duty of careful supervision at all times, and concluded that the defendant must either explain the nature of the accident so as to exculpate himself or suffer an adverse verdict.[71] The dissent argued that the decision in effect imposed absolute liability on the defendant.[72]

The liberal application of *res ipsa* in *Quintal* and *Fowler* can be best understood on grounds of public policy. In both cases because of the relationship between the parties the defendant owed a special duty to the plaintiff. This special relationship justified the procedural effect of *res ipsa,* i.e. shifting the burden of proof to the defendant.[73] California courts have used *res ipsa* as a "deliberate instrument of policy,"[74] and, as reflected in *Quintal* and *Fowler,* a special relationship between the parties, as a matter of policy, now apparently enables the plaintiff to establish a *res ipsa* case even though an essential element of the doctrine is lacking.[75] As explained by one court the "increasing use of res ipsa exemplifies the growing recognition of courts of special obligations which arise from particular relationships."[76]

Conclusion

The liberal extension of *res ipsa loquitur* in medical malpractice cases because of the *special obligation* which the physician owes to his patient is intended

[68] In *Siverson,* however, the medical witnesses also recognized that a fistula following a hysterectomy *might* be the result of negligence, but the court stressed that since the injury might also occur absent negligence it was necessary to show that in the rare cases where it did occur it was probably the result of negligence. Siverson v. Weber, 57 Cal. 2d, 824, 838-839, 372 P.2d 97, 99 (1962).

[69] 61 Cal. 2d 681, 394 P.2d 697 (1964).

[70] Note, 38 So. CAL. L. REV. 740, 743 (1965); Note, 17 STAN. L. REV. 768, 771 (1965).

[71] Fowler v. Seaton, 61 Cal. 2d 681, 688, 394 P.2d 697, 701 (1964).

[72] *Id.* at 691, 394 P.2d at 703 (dissenting opinion).

[73] See note 9 *supra* and accompanying text.

[74] Prosser, *supra* note 4, at 212.

[75] Of course, the California courts relatively early regarded the classic elements of *res ipsa* as flexible. See Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 436 (1944).

[76] Cho v. Kempler, 177 Cal. App. 2d 342, 348, 2 Cal. Rptr. 167, 171 (1960).