63.20 8/26/69

Memorandum 69-88

Subject: Study 63.20 - Evidence (Res Ipsa Loquitur)

The tentative recommendation that includes the tentatively recommended section dealing with res ipsa loquitur (Section 646) was distributed to you with Memorandum 69-99. For the portion discussing res ipsa, see pages 1-3, 8-12.

Attached to this memorandum are the exhibits containing the comments received on this tentative recommendation. Also attached are the pertinent portions of Witkin's California Evidence (2d ed.) and of the 1967 California Jury Instructions--Civil (BAJI). However, before discussing the substance of the tentative recommendation, the staff wishes to propose a few technical corrections:

Technical corrections

On page 2, the second paragraph should read:

> Under the Evidence Code, it seems clear that the doctrine of res ipsa loquitur is actually a presumption, for its effect as stated in the Sherwin Williams case is precisely the effect of a presumption under the Evidence Code when there has been no evidence introduced to overcome the presumed fact. See EVIDENCE CODE §§ 600, 604, 606, and the Comments thereto. See also WITKIN, CALIFORNIA EVIDENCE § 264 (2d ed. 1966) ("The problem of characterization is now solved by the Evidence Code, under which the judicially created doctrine must be deemed a presumption."). The Evidence Code, however, does not state specifically whether res ipsa loquitur is a presumption affecting the burden of proof or a presumption affecting the burden of producing evidence.

On page 2, the first portion of the last paragraph should read:

> The doctrine of res ipsa loquitur, therefore, should be classified as a presumption affecting the burden of producing evidence in order to eliminate any uncertainties concerning the manner in which it functions under the Evidence Code. It is likely that this classification will codify existing law.[1] Such a classification will also . . .

[1] Witkin states that "our prior cases make it clear that [res ipsa loquitur] belongs in the class of presumptions which merely affect

the burden of producing evidence." WITKIN, CALIFORNIA EVIDENCE § 264 (2d ed. 1966). McBaine takes the view that whether res ipsa loquitur "must be regarded as a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof cannot be determined with certainty until the courts rule on the matter or the Legislature enacts clarifying legislation." McBAINE, CALIFORNIA EVIDENCE MANUAL § 1245 (2d ed., 1967 Supp.). The Committee on Standard Jury Instructions has classified res ipsa loquitur as a presumption affecting the burden of producing evidence. See 2 BAJI, 1967 Supp. at 42 et seq., Comments to BAJI 206.

Finally, the staff suggests that the first paragraph on page 3 be deleted.

On page 11, in the third line of the paragraph entitled, "Basic facts established as matter of law; evidence introduced to rebut presumption," the phrase "sufficient to sustain a finding" should be added after the word "evidence."

The general reaction

The Commission's recommended provision is basically a compromise position between the position advocated by the California Trial Lawyers Association (presumption is one affecting the burden of proof) and that advocated for medical malpractice cases by the California Medical Association (which would substantially limit presumption in medical malpractice cases). The basic question is whether the presumption should be one affecting the burden of producing evidence or one affecting the burden of proof. The CTLA (Exhibit V) and Judge Richards (Exhibit II) argue that the presumption should be one affecting the burden of proof. On the other hand, Witkin states that "our prior cases make it clear that [res ipsa loquitur] belongs in the class of presumptions which merely affect the burden of producing evidence." The Committee on Standard Jury Instructions has classified res ipsa loquitur as a presumption affecting the

burden of producing evidence. As Judge Richards notes, classifying res ipsa as a presumption affecting the burden of proof would run "counter to the Restatement and to Dean Prosser." Thus, the Commission's tentative recommendation would have codified what appears to be existing law. The existing law is not entirely clear, however. For example, McBaine, in his California Evidence Manual, takes the view that whether res ipsa loquitur "must be regarded as a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof cannot be determined with certainty until the courts rule on the matter or the Legislature enacts clarifying legislation." There is a general recognition of the need to clarify the law in this area. The California Medical Association states:

> We believe that it is in the public interest to identify and stabilize the role of res ipsa loquitur in the judgment process. If the rules of the game are known and established in advance, one can adjust and abide by them. When the rules are in flux and frequently determined after the fact, conditions are intolerable.

Judge Richards points out that the members of the Committee on Standard Jury Instructions are in disagreement as to the proper rules to be applied to res ipsa. He states that, unless the matter is made clear, it will "necessitate years of litigation to determine the extent of defendant's burden to counteract the inference of negligence if drawn" in view of the classification of the presumption as a Section 603 presumption.

The policy considerations as to how res ipsa should be classified are stated in the various materials attached to this memorandum. Our original effort was to codify what we believed was existing law. Obviously, neither the California Trial Lawyers Association nor the California Medical Association will be completely satisfied with our effort. Nevertheless,

our effort would provide some certainty in this important area of the law, and we believe that the Commission should not change its prior decision to make res ipsa a presumption affecting the burden of producing evidence.

See the last page of Exhibit II for a draft of a statute section making res ipsa a presumption affecting the burden of proof.

Specific comments

Phrasing of statute. Both Judge Richards (Exhibit I) and the California Trial Lawyers Association (Exhibit V) are concerned that the second sentence of the proposed statute section is unclear. In addition, the staff is of the view that the 1967 BAJI jury instruction dealing with the burden placed on the defendant is unclear, and the BAJI instruction was drafted with our proposed section in mind. Accordingly, in the interest of clarity, we suggest that the following be substituted for the second sentence of Section 646 on page 8:

> If the defendant introduces evidence which would support a finding that he was not negligent, the court may and upon request shall instruct the jury in substance that the jury may draw an inference that the defendant was negligent if the facts that give rise to the presumption are established but that, in order to hold the defendant liable, the jury must find that the probative force of the inference of negligence arising from the establishment of the facts that give rise to the presumption, either alone or with such other evidence, if any, as favors it, exceeds the probative force of the contrary evidence and, therefore, that it is more probable than not that the defendant was negligent.

An alternative phrasing of the same concept is set out below:

> If the defendant introduces evidence which would support a finding that he was not negligent, the court may, and upon request shall, instruct the jury that it may draw the inference that the defendant was negligent if the facts that give rise to the presumption are established. In such a case, the jury shall also be instructed in substance that it should find the defendant negligent only if, after weighing the circumstantial evidence of negligence together with all of the other evidence in the case, it believes that it is more probable than not that the defendant was negligent.

The two alternatives are based in part on superseded BAJI 206-D (attached).

In connection with the phrasing of the concept, you should note BAJI 22 (1967 Revision):

> 22. Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

Also of interest in connection with the phrasing of the concept is BAJI 21 (1967 Revision):

> 21. In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:
>
> 1.
> 2.
> 3.
>
> The defendant has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:
>
> 1.
> 2.
> 3.
>
> By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who had the burden of proving it.
>
> In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

Elements of res ipsa loquitur. It should be noted that the proposed statute is limited in purpose. It merely classifies res ipsa as a presumption affecting the burden of producing evidence. It does not attempt to state the elements of the doctrine. Cf. Judge Richards' proposed section in Exhibit II. The staff believes that it was a wise decision not to attempt to state the various elements of the doctrine in the statute. Accordingly, the suggested possible revision of one element of the doctrine in Exhibit III would be beyond the socpe of the recommendation as presently drafted. If the Commission desires to attempt to state the elements of the doctrine in the statute, the staff believes that a comprehensive research study would be needed. Although the elements can be stated in the Comment, and we believe accurately stated, we would not want to codify and freeze them in the law without a careful study. Hence, we suggest that the Commission not attempt to solve the problem presented by Judge Horn in Exhibit III.

Senate Bill 351. The California Medical Association has sent us a copy of Senate Bill 351 (see Exhibit IV) and material in support of that bill. The California Trial Lawyers Association has sent us material in opposition to that bill. See Exhibit V. We suggest that you read the material attached to this memorandum relating to Senate Bill 351. The staff suggests that no revision be made in our proposed statute to incorporate any of the substance of Senate Bill 351.

Interim hearings. The matter of res ipsa loquitur is of great concern to the Legislature. The Senate Fact Finding Committee on Judiciary is holding an interim hearing on res ipsa in medical malpractice cases. I would like to be in a position to advise the interim committee as to the Commission's conclusions on res ipsa loquitur.

Respectfully submitted,

John H. DeMoully
Executive Secretary

Memo 69-88 EXHIBIT I

The Superior Court

111 NORTH HILL STREET

LOS ANGELES, CALIFORNIA 90012

OFFICE OF
COMMITTEE ON BAJI
COMMITTEE ON CALJIC
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February 10, 1969

Mr. John H. De Moully
Executive Secretary
California Law Revision Commission
Rm 30, Crouthers Hall
Stanford, Calif. 94305

Dear Mr. De Moully:

Two years ago, in preparing the 1967 Pocket Part for BAJI, I had the pleasure of corresponding with Mr. Harvey, but now that he is no longer with the Commission I am addressing this letter to you.

The manuscript for the Fifth Edition of BAJI is in the hands of the publisher and we expect to have the galley proof for correction in about a month.

Included in the new edition are instructions on res ipsa loquitur essentially the same as the enclosed copies of the present Instructions 206-A, 206 and 206.1.

We have read with interest and concern your tentative recommendation concerning res ipsa loquitur dated January 15, 1969. In our 1967 Cumulative Supplement we assumed that res ipsa would operate under the Evidence Code Section 604 as a presumption affecting the burden of producing evidence in accordance with your tentative recommendation dated January 1, 1966 and revised our instructions accordingly.

Assuming that res ipsa is so classified as a 604 presumption, we recommend instructing under your four examples beginning on page 6, as follows:

(1) Basic facts established as a matter of law; no rebuttal evidence. Use BAJI 206.1 alone.

(2) Basic facts established as a matter of law; evidence introduced to rebut presumption. Use BAJI 206 alone.

(3) Basic facts contested; no rebuttal evidence. Use BAJI 206-A, followed by 206.1.

(4) Basic facts contested; evidence introduced to rebut presumption. Use BAJI 206-A, followed by 206.

We agree that if there is evidence rebutting the presumption, only an inference of negligence may be drawn, such as stated in the first paragraph of BAJI 206. This seems compatible with your Comment on page 6 in Example 2, that: "In this situation the court may instruct the jury that it may infer from the established facts that negligence on the part of defendant was a proximate cause of the accident." In this example, it is assumed that the basic facts have been established as a matter of law, as you say in Example 1: "(By the pleadings by stipulation by pretrial order, etc.)." Hence, there may be little or no evidence of the classic conditions giving rise to the doctrine of res ipsa.

Our great concern relates to the last sentence of Example 2, on page 6, which reads: "The instruction should make it clear, however, that the jury should draw the inference only if, after weighing the circumstantial evidence of negligence, together with all of the other evidence in the case, it believes that it is more likely than not that the accident was caused by the defendant's negligence."

Example 4 concludes with a similar statement.

If the Comment referred to becomes the basis upon which an inference may be drawn, BAJI 206 would have to be revised to read:

> "From the happening of the accident involved in this case, an inference may be drawn that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.
>
> "However, you should not draw that inference unless after weighing all of the evidence in the case, you believe that it is more likely than not that the occurrence was caused by defendant's negligence."
>
> or
>
> "From the happening of the accident in this case, you may infer that the defendant was negligent and that his negligence was a proximate cause of the occurrence, if you are convinced from all of the evidence that it is more likely than not that defendant's negligence was a proximate cause of the occurrence."

In other words, as we interpret the Notes, we must instruct the jury that even though the elements giving rise to the doctrine of res ipsa loquitur are established as a matter of law, the jury may infer the defendant's negligence only if they find that the

evidence establishes that it is more likely than not that the defendant was negligent. This seems to us to mean that plaintiff must establish defendant's negligence by a preponderance of the evidence before the inference of the negligence may be drawn. If it does, then res ipsa becomes completely emasculated whenever the defendant offers any evidence rebutting his negligence and the doctrine would only be operative when there is no evidence rebutting his negligence and the basic facts giving rise to the doctrine are established as a matter of law or found by the jury.

In Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, at 442, the Supreme Court, quoting from La Porte v. Houston, 33 Cal.2d 167, said: "The applicability of the doctrine of res ipsa loquitur depends on whether it can be said in the light of common experience that the accident was more likely than not the result of [defendant's] negligence."

When the three conditions set forth in Instruction 206-A are stipulated or found from the evidence, the applicability of the doctrine is established and it does not require an additional determination by the jury that "it is more likely than not that the accident was caused by defendant's negligence." There does not appear to be anything in the proposed Section 646 that requires or justifies the questioned Comment. As your Comment on page 4 says: "If evidence is produced that would support a finding that the defendant exercised due care, the presumptive effect of the doctrine vanishes. However, the jury may still be able to draw an inference of negligence from the facts that gave rise to the presumption."

The same paragraph concludes quite properly that "The facts giving rise to the doctrine will support an inference of negligence even after its presumptive effect has disappeared."

Once the jury believes the facts essential to give rise to the doctrine they may draw the inference of negligence because the likelihood of defendant's negligence being the cause is built into the facts which are either established as a matter of law or are found by the jury in order for the doctrine to apply.

Incidentally, what is the purpose of the phrase "from such evidence" in the next to last line of proposed Section 646? It appears to me that it can only refer back to "evidence which would support a finding that he was not negligent." The res ipsa inference of responsibility does not arise from the defendant's denial of negligence. It seems to me that the questioned language should be omitted.

As page one of your tentative recommendations points out, res ipsa is a problem which very frequently arises and we must certainly want to be as correct as possible in our new edition--which is my apology for the length of this letter--and I trust that I have made our concern clear.

Very truly yours,

Philip H. Richards
Consultant

PHR/fv

Encl.

Memo 69-88 EXHIBIT II

The Superior Court

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May 16, 1969

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
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Stanford University
Stanford, California 94305

Dear Mr. DeMoully:

Since my letter of February 10, 1969, regarding your proposed Evidence Code Section 646, which would establish the doctrine of res ipsa loquitur as a presumption affecting the burden of producing evidence, I have been increasingly concerned that to establish the doctrine as a 603 presumption will not only emasculate the doctrine but would necessitate years of litigation to determine the extent of defendant's burden to counteract the inference of negligence if drawn.

With this in mind, I make a bold suggestion that res ipsa be made a 605 presumption and enclose a proposed new Evidence Code Section 670 to that effect which is modeled after Section 669.

If the so-called res ipsa conditional facts are established as a matter of law, or, if contested by a preponderance of the evidence and there is no rebuttal evidence, res ipsa as a 605 presumption would operate exactly the same as a 603 presumption. That is, if the basic facts are established as a matter of law, "the court must simply instruct the jury that it is required to find that the defendant was negligent" (Tentative Recommendation, p. 6) or, if established on contested basic facts, "the court should instruct the jury that, if it finds that the basic facts have been established by a preponderence of the evidence, then it must also find that the defendant was negligent." (Tentative Recommendation, p. 7.)

Under the existing law, even if there is rebuttal evidence, where "the facts giving rise to the doctrine being undisputed, the jury was properly instructed that the inference of negligence arose as a matter of law." (Di Mare v. Cresci, 58 Cal.2d 292, 300.) Where the basic facts are contested, "where the facts justify the res ipsa loquitur inference the trier of fact must draw it, thus requiring the defense to go forward with rebuttal evidence." (Greening v. General Air-Conditioning Corp., 233 Cal.App.2d 545, 551.)

In other words, under existing law the inference of negligence is drawn whenever the basic facts are undisputed or, if contested, are established and the defendant is then required to go forward to rebut the inference.

As a 605 presumption, the presumption of negligence would arise where the basic facts are established as a matter of law or, if contested, by a preponderance of the evidence.

The only difference would be that under existing law the defendant must rebut an inference the effect of which is "somewhat akin to that of a presumption" (Burr v. Sherwin Williams Co., 42 Cal.2d 682, 688), while as a 605 presumption the defendant would have the "burden of proof as to the nonexistence of the presumed fact." (Civil Code § 606) As res ipsa is now construed, it seems to me that a shift from rebutting the inference of negligence to establishing "the nonexistence of the presumed fact" is more a matter of semantics than of practicality. In Seffert v. Los Angeles Transit Lines, 56 Cal.2d 498, 502, Justice Peters says: "Read as a whole the instructions correctly state the law of California that if the defendants are to prevail they must rebut the res ipsa loquitur inference with evidence of as convincing force." And in Di Mare v. Cresci, supra, at p. 300, Chief Justice Gibson says, referring to the res ipsa loquitur inference of negligence: "This, of course, does not mean that there was liability as a matter of law but only that defendant had the burden of meeting or balancing the inference."

There can be no question but that under existing law the defendant has a substantial burden to overcome the inference of negligence by negligence of at least equal if not greater weight.

The only change in defendant's burden in establishing res ipsa as a 605 presumption would be, instead of requiring defendant to "dispel or equally balance the inference of negligence" (Gerhardt v. Fresno Medical Group, 217 Cal.App.2d 353, 360) or, as stated in Di Mare v. Cresci (supra), "the inference could be balanced by defendant by showing that if she did, in fact, exercise due care or that the accident was caused by factors which did not involve negligence," the defendant would be required to rebut the presumption of negligence by a preponderance of evidence establishing one or more of the three ways in which the present inference is rebutted.

I can see very little practical difference from the standpoint of a jury between evidence of defendant's due care or of a cause of the accident not attributable to defendant's negligence which is sufficient to dispel or offset the inference of negligence on the one hand or a simple preponderance of the evidence establishing a cause of the accident not attributable to defendant's negligence or establishing defendant's exercise of due care on the other hand.

If established as on 605 presumption, res ipsa would operate as follows:

1. Basic facts established as a matter of law; no rebuttal evidence. Here the jury would be instructed that they must find defendant negligent.

2. Basic facts established as a matter of law; evidence introduced to rebut presumption. Here instruct the jury that they must find defendant negligent unless defendant establishes by a preponderance of evidence a cause of the accident not attributable to his negligence or proof of care that establishes the accident was not due to his lack of care or that the accident was due to some cause other than his negligence although the exact cause is unknown.

3. Basic facts contested; no rebuttal evidence. Here instruct the jury that if they find the basic facts they must find the defendant negligent.

4. Basic facts contested; evidence introduced to rebut presumption. Here instruct the jury that if they find the basic facts they must find defendant negligent unless he establishes by a preponderance of the evidence a cause of the accident not attributable to his negligence or proof of care that establishes the accident was not due to his lack of care or that the accident was due to some cause other than his negligence although the exact cause is unknown.

I realize that this suggestion runs counter to the Restatement and to Dean Prosser, but I think we must also realize that res ipsa has long since ceased to be merely a device to get plaintiff by a nonsuit. In this connection it is interesting to note Justice Tobriner's observation nearly ten years ago in Cho v. Kempler, 177 Cal.App.2d 342 at 348, a malpractice case, where he says:

> "The increasing use of res ipsa loquitur examplifies the growing recognition of the course of the special obligations which arise from particular relationships. Prosser . . . points out that 'where the particular defendant is in a position of some special responsibility toward the plaintiff or the public'. . . the doctrine is designed to protect the dependent party from unexplained injury at the hands of one in whom he has reposed trust. The device 'has been used by the courts, consciously or otherwise, as a deliberate instrument of policy imposing a procedural disadvantage upon the defendant which will require him to establish his freedom from negligence or to pay.' . . . In an integrated society where individuals become inevitably dependent upon others for the exercise of due care, where these relationships are closely interwoven with our daily living, the requirement for explanation is not too great a burden to impose upon those who wield the instruments of injury and whose due care is vital to life itself."

There is enclosed a form of jury instruction predicated upon such a change and which follows the general pattern of our negligence per se instruction, BAJI 149 (Evid. Code § 609 [Revised]).

Please understand that this suggestion is mine personally and not that of the BAJI Committee, although some of the members agree with me.

Cordially yours,

Philip H. Richards

PHR/fv

Encl.

PROPOSED INSTRUCTION

BAJI 4.00

RES IPSA LOQUITUR

On the issue of negligence, one of the questions for you to decide in this case is whether the [accident] [injury] occurred under the following conditions:

(1) That it is the kind of [accident][injury] which ordinarily does not occur in the absence of someone's negligence;

(2) That it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after the defendant relinquished control]; and

(3) That the [accident][injury] was not due to any voluntary action or contribution on the part of the plaintiff which was the responsible cause of the [accident][injury].

If, and only if you find these conditions to exist, you will find that a proximate cause of the [accident][injury] was some negligent conduct on the part of the defendant.

[However, you shall not find merely from the happening of the [accident][injury] under the foregoing conditions that a proximate cause of the occurrence was some negligent conduct on the part of the defendant if he proves by a preponderance of the evidence:

(1) A definite cause for the [accident][injury] not attributable to any ngeligence on his part, or

(2) That he exercised such care that establishes that the [accident] [injury] did not happen because of his lack of care, or

(3) That the [accident][injury] was due to some cause other than defendant's lack of care, although the exact cause may be unknown.]

PROPOSED

EVIDENCE CODE § 670

RES IPSA LOQUITUR

(a) The failure of a person to exercise due care is presumed if:

(1) There is a kind of accident which ordinarily does not occur in the absence of someone's negligence;

(2) The accident was caused by an agency or instrumentality in the exclusive control of said person [orginally, and which was not mishandled or otherwise changed after said person relinquished control]; and

(3) The accident was not due to any voluntary action or contribution on the part of the injured party which was the responsible cause of the injury.

(b) The presumption may be rebutted by proof which establishes:

(1) A definite cause for the accident not attributable to any negligence of said person, or

(2) Such care by said person that establishes that the accident did not happen because of his lack of care, or

(3) That the accident was due to some cause other than said person's lack of care, although the exact cause may be unknown.

Memo 69-88

EXHIBIT III

Superior Court of California

San Francisco

City Hall

CLAYTON W. HORN JUDGE

March 13, 1969

California Law Revision Commission
School of Law
Stanford University
Stanford, California, 94305

Re: res ipsa loquitur

Gentlemen:

Thank you for sending me the tentative recommendation relating to evidence code -- res ipsa loquitur. The matter which I recite has caused some confusion in the doctrine itself and possibly should be considered by the commission in arriving at a final conclusion.

In Vistica vs. Presbyterian Hospital, 67 C.2d 465 (1967) the court criticized the long established condition "that the accident was not due to any voluntary action or contribution on the part of the plaintiff." The BAJI Committee, because of the Vistica case, revised BAJI 206-A and B by changing the fourth paragraph in each instruction to read:

> Third, that the accident (injury) was not due to any voluntary action or contribution on the part of the plaintiff, which was the responsible cause of his injury."

Both the Vistica decision and the change in the BAJI instruction have been criticized by Witkin.

I suggest that it may be advisable to give special consideration to the "voluntary action" condition in drafting new Evidence Code 646 in order to eliminate or avoid confusion in instructing the jury on the doctrine.

Yours truly,

Clayton W. Horn

CWH/lod

Memo 69-88 EXHIBIT IV

CALIFORNIA MEDICAL ASSOCIATION

February 26, 1969

California Law Revision Commission
School of Law
Stanford University
Palo Alto, California

Gentlemen:

The California Medical Association has been greatly concerned with respect to problems in the field of medical malpractice and professional liability insurance. It has and continues to study various facets of this most publicly important area of the law. One of the objects of its studies has been the utilization by our courts of the doctrine of res ipsa loquitur.

Last year the Association retained David S. Rubsamen, M.D., LL.B., to research the development and current status of res ipsa loquitur and to submit recommendations for improvement. Dr. Rubsamen is the author of legal articles on the subject of res ipsa loquitur and has been a student of the doctrine for some years.

He has submitted a report to the Association, a summary of which is enclosed herewith. On the foundation of his report, a bill has been drafted for introduction in the California Legislature and a copy of it is also enclosed herewith. It has been introduced by Senator Lewis F. Sherman, Oakland (and its No. is SB 351). We are transmitting the summary and bill to you because we are aware of your interest in this subject.

We also commend to your attention the recent tentative recommendations of the Lalifornia Law Revision Commission relating to res ipsa loquitur (Publication # 63, dated

January 15, 1969). We especially point out that the approach recommended by the California Law Revision Commission in identifying res ipsa loquitur as a rebuttable presumption affecting the burden of producing evidence is included in our legislative proposal.

We would welcome any comments and suggestions that you may wish to offer. We believe it is in the public interest to identify and stabilize the role of res ipsa loquitur in the judgment process. If the rules of the game are known and established in advance, one can adjust and abide by them. When the rules are in flux and frequently determined after the fact, conditions are intolerable.

Finally, we are acutely conscous that the entire body politic is affected in the establishment of public policies relating to medical professional liability. We seek an equitable balance.

Sincerely yours,

Malcolm C. Todd, M.D.
President

MCT/abr
Enclosures - 2

SENATE BILL No. 351

Introduced by Senator Sherman

February 19, 1969

REFERRED TO COMMITTEE ON JUDICIARY

An act to add Section 608 to the Evidence Code, relating to evidence.

The people of the State of California do enact as follows:

SECTION 1. Section 608 is added to the Evidence Code, to read:

608. The application of the doctrine known as "res ipsa loquitur" only creates a rebuttable presumption which affects the burden of producing evidence. Res ipsa loquitur shall be applied only to those accidental injuries which more probably than not constitute circumstantial evidence of negligence. Where there is a calculated risk of accidental injury, the rarity of accidents shall not constitute a ground or reason for application of res ipsa loquitur. In cases of rare accident or injury, associated with a calculated risk of occurrence, and with the addition of specific proof of negligence, res ipsa loquitur shall not be applied and the rebuttable presumption, as provided for by this section, shall not apply.

LEGISLATIVE COUNSEL'S DIGEST

SB 351, as introduced, Sherman (Jud.). Evidence: res ipsa loquitur.

Adds Sec. 608, Evid.C.

Provides that the application of the doctrine of "res ipsa loquitur" creates a rebuttable presumption which affects the burden of producing evidence, as distinguished from a rebuttable presumption affecting the burden of proof. Specifies that this doctrine shall apply only to accidents of a type which more probably than not constitute circumstantial evidence of negligence, and makes provision for its inapplication.

Vote—Majority; Appropriation—No; Sen. Fin.—No; W. & M.—No.

O

DAVID S. RUBSAMEN, M.D., LL.B.
102 EL CAMINO REAL
BERKELEY, CALIFORNIA 94705
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January 24, 1969

AN ANALYSIS OF RES IPSA LOQUITUR IN CALIFORNIA MEDICAL MALPRACTICE LAW*

INTRODUCTION:

Sometimes doctors injure patients. Is the injury probably due to medical negligence, or is it one of those inevitable untoward results, arising from an inherent risk of the medical procedure? This is the question. As a rule the patient can't answer it. It commonly has been assumed that the doctor and his colleagues won't.[1] So California courts have undertaken to speculate on the doctor's possible liability where the nature of the injury makes his dereliction seem likely. This is the policy basis for res ipsa loquitur. Clearly, it is a doctrine of circumstantial evidence.[2]

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*Only the introduction, summary and a legislative proposal are included in this report. A detailed analysis will be available in about six weeks.

[1] In medical malpractice cases res ipsa loquitur has been the judicial answer to the medical community's "conspiracy of silence". The progressive expansion of res ipsa loquitur seems, in major part, an expression of the court's conviction that physicians have not yet awakened to their civic duty to testify for plaintiffs in malpractice actions. Evidence on this issue is an important feature of my analysis, and this is found in Appendix A. This demonstrates through a review of 100 recent malpractice trials, that this "conspiracy" no longer exists.

[2] In Meyer vs. McNutt Hospital, 173 Cal. 156, 159 Pac. 436 (1916), Justice Melvin justified application of res ipsa loquitur with the observation, "Negligence like almost any other fact may be established by circumstantial evidence." In Ybarra vs. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944), Chief Justice Gibson refers to res

Intelligent judicial application of res ipsa loquitur requires logical answers to two questions: First, what sort of medical injury really is circumstantial evidence of negligence?[3] Second, once res ipsa loquitur applies, how complete an explanation should be required of the defendant?[4]

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ipsa loquitur as a "simple, understandable rule of circumstantial evidence, with a sound background of commonsense and human experience...." In Fowler vs. Seaton, 61 Cal.2d, 681, 394 P.2d 697 (1964), Justice Peters says, with reference to res ipsa, "Of course, negligence and connecting the defendant with it, like other facts, can be proved by circumstantial evidence." In Prosser, Torts, Section 42 at 201 (2nd edition 1955), "One type of circumstantial evidence....is that which is given the name res ipsa loquitur. In its inception the principle was nothing more than a reasonable conclusion, from the circumstances of an unusual accident, that it was probably the defendant's fault." In Shearman and Redfield on Negligence (Revised edition 1941), Section 56 at 150, res ipsa loquitur is characterized as a "commonsense appraisal of the probative value of circumstantial evidence."

[3]Res ipsa loquitur is defined by three elements: One, the injury must be one which common knowledge indicates does not ordinarily occur absent negligence. In medical malpractice cases this conclusion is based either on knowledge common to laymen, or expert testimony may establish that the conclusion is common knowledge among experts. Two, the plaintiff must not contribute to his own injury. Ordinarily, this requirement is not of concern in medical cases because the patient is usually passive. Three, the defendant must be in exclusive control of the instrumentalities likely to have caused the injury. This element is not taken literally; it is enough that the circumstances of the accident indicate that the defendant might be responsible for any negligence connected with it.

[4]An injury constitutes circumstantial evidence of negligence where there is no calculated risk that the particular injury can occur absent negligence. When res ipsa loquitur is limited to such accidents, it is obvious that some rebuttal should be required of the defendant. His response, "I don't know what happened," will be inadequate.

The Court's response to the first question has been to broaden, progressively, the scope of application of res ipsa. The answer to the second question is unclear, but problems of evidentiary weight largely disappear once the doctrine is accurately applied.

My analysis of judicial misapplication of res ipsa loquitur focuses on precise legal problems: Its irrational application to rare accidents, the doctrine's application to fact situations where there is only direct evidence of negligence (and neither a rare accident nor circumstantial evidence is involved) and, finally, the burden of explanation which res ipsa loquitur imposes on the defendant. The social implications of the progressive expansion of res ipsa are not considered here, and yet this intangible quantity is vitally important.

More than one Supreme Court justice, in recent cases, has felt that res ipsa loquitur is now approaching a principle of strict liability, at least in the field of rare surgical accidents. So the doctrine is likely to trap the physician whose patient is involved in an untoward event which fits a certain factual scheme, the breadth of which is vast but not yet delimited. This increased risk of liability cannot fail to have this effect: When doctors make decisions in those areas of medical practice which are particularly susceptible to malpractice liability, their judgment will be colored by legal considerations. Thus, factors which weigh in making medical decisions will no longer be solely medical ones. A legal consideration that has nothing to do with the patient's welfare will go into the balance. A rule of law that has this patently adverse social effect must be modified.

SUMMARY:

Prior to the "modern" application of res ipsa loquitur, the California Supreme Court treated it as a doctrine of circumstantial evidence. A variety of medical injuries, which could not be excused by reference to some calculated risk, were accepted as circumstantial evidence of negligence. These involved such accidents as a burn on the leg and a paralyzed arm following abdominal surgery, foreign bodies left in the abdome after surgery and the knocking out of a tooth incident to tonsillectomy.

Then, parallel with the increase in malpractice litigation, it became clear that rare accidents, and especially those incident to surgery, have been an increasing source of concern to the Supreme Court. Does rarity alone (assuming there is a calculated risk of the accide t) justify application of res ipsa? In other words, does the fact of

rarity constitue circumstantial evidence of neligence? Beginning in 1950 with Cavero vs. Franklin Gen. Benevolent Soc'y,[5] the Court has equivocated about accepting the rarity of an accident as the sole basis for application of res ipsa loquitur. In some decisions the Court expresses the conviction that rare accidents just shouldn't happen, unless someone has been careless. In other decisions the inevitability (i.e. the calculated risk) of many rare accidents is recognized.[6]

In the past four years, the Supreme Court arrived at an accommodation between rare accidents and calculated risks. These cases reflect the following reasoning: Granted that a rare accident, which is "within the risk" of the medical procedure, is no basis for the application of res ipsa loquitur, what if there is some direct evidence which might be accepted by the jury as indicative of negligence? In that case, this evidence of negligence increases the likelihood that the rare accident was negligently caused, and so res ipsa is applicable on a "conditional" basis. That is, the doctrine will apply if the jury accepts the evidence of substandard medical conduct.

From a legal standpoint there are two fallacies in this expansion of res ipsa: First, res ipsa loquitur has as its point of reference some specific injury. The addition of a particular fact of negligence to that injury does not make the injury, itself, circumstantial evidence of negligence. Second, direct evidence of negligence has nothing to do with res ipsa loquitur. Where an injury is circumstantial evidence of negligence, the addition of direct evidence of negligence does not rule out the doctrine's application. However, if the injury itself is not circumstantial evidence of negligence, while the addition of direct evidence of negligence will establish the plaintiff's prima faciae case, this direct evidence does not make the application of res ipsa rational.

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[5] 36 Cal 2d 301, 223 P.2d 471 (1950).

[6] There must be a rare surgical accident somewhere in California almost daily. Frequently the physician has no better explanation for it than the patient. To say that rare accidents seldom happen is only a truism, and where there is a calculated risk of such an accident there is no basis for assuming that negligence is likely.

From a practical standpoint, the concept of conditional res ipsa will assure application of res ipsa loquitur to many rare medical accidents. Providing the attorney digs hard enough to find it, any complex medical case (especially one involving surgery) is likely to yield some evidence which might be interpreted by a lay jury as a substandard act, or omission. Such evidence, taken alone, might fail to establish a convincing argument for negligence. But combined with an instruction on the supposed significance of this evidence in combination with a rare accident (and recognizing the burden of explanation placed on the defendant) the plaintiff's case might become very persuasive. Minority opinions on the recent conditional res ipsa cases have argued that this application of the doctrine approaches imposition of absolute liability.

If there is any doubt that the California Supreme Court has departed from any limitation on res ipsa loquitur as a doctrine of circumstantial evidence, it is removed by two recent decisions. These cases, both involving suicide of psychiatric patients while hospitalized, involved neither unexplained accidents nor circumstantial evidence of negligence. Instead, the plaintiffs' prima facie cases were made out by abundant direct evidence. These opinions offer no clear justification for the doctrine's application.

The defendant's burden of exculpation, once res ipsa applies, presents no difficulty if the doctrine's application is rational. In the context of medical malpractice cases, it is just to require an explanation of the defendant when an injury occurs which is not within the risk of the medical procedure.

In non-medical cases, also, the application of res ipsa loquitur has become distorted. In Fowler vs. Seaton[7] we find a similar departure from a limitation of the doctrine to circumstantial evidence.

The attached legislative proposal seeks a rationalization of res ipsa loquitur by restoring its role as a doctrine of circumstantial evidence.

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[7] 61 Cal.2d 681; 394 P.2d 697 (1964)

D. S. Rubsamen

D. S. Rubsamen, M.D., LL.B.

Memo 69-88 EXHIBIT V

CALIFORNIA TRIAL LAWYERS ASSOCIATION

March 26, 1969

John H. De Moully, Executive Secretary
California Law Revision Commission
School of Law
Stanford, California 94305

Re: Tentative Recommendation relating to
Evidence Code Number 5 - Res Ipsa Loquitur

Dear Mr. De Moully:

The following comments are submitted on behalf of the California Trial Lawyers Association.

We disagree with the proposed Section 646 of the Evidence Code in the following respects:

1. We do not agree that the judicial doctrine of res ipsa loquitur should be a presumption affecting the burden of producing evidence under Sections 603 and 604 of the Evidence Code. We believe it should be a presumption affecting the burden of proof under Sections 605 and 606 of the Evidence Code and the new section should so provide, or, in the alternative, this should be left to judicial determination or legislative determination in a substantive context and not in the form of a procedural or evidential proposal.

2. We believe that the second sentence of proposed Section 646 is misleading and ambiguous.

3. We disagree with certain of the explanatory comments.

We shall discuss the foregoing in seriatim.

a. Whether res ipsa loquitur should be a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof.

Section 603, Evidence Code defines a presumption affecting the burden of producing evidence as one established to implement "no public policy other than to facilitate the deter-

Exhibit "D"

mination of the particular action in which the presumption is applied." On the other hand, presumptions affecting the burden of proof are those established to implement some public policy other than to facilitate the determination of the particular action. Section 605, Evidence Code.

We believe that the res ipsa loquitur doctrine involves special situations which, in most cases, affect the entire substantive cause of action of an injured party who is without means of knowing the cause of his injury. It seems clear to us that this doctrine differs greatly from the present statutorily classified Section 603 presumptions, or the type of presumption contemplated in Section 603. The present Section 603 presumptions deal largely with facilitation of specific items of proof in connection with elementary evidence problems common to collection or commercial matters (e.g., Evidence Code Sections 631 through 637). Present Section 603 presumptions also include such presumptions as the following: one exercising acts of ownership over property is the owner (Section 638), a judgment correctly determines the rights of the parties (Section 639), a writing is truly dated (Section 640), a letter mailed has been received (Section 641), a person under a duty to convey property did so (Section 642), authenticity of ancient documents (Section 643) and correctness of certain books and reports of cases (Sections 644-645). In all instances, then, Section 603 presumptions deal solely with facilitating some specific item of proof. In almost all instances, if the Section 603 presumption dropped out of the case, the party would be able to prove the matter in some other fashion, or, even if he were not able to prove the matter, he might prevail, since these presumptions do not embrace the entire substantive cause of action.

The consequences, effect and importance of res ipsa loquitur is in sharp contrast to the existing Section 603

presumptions. In most instances, the doctrine is indispensable to the cause of action of the party asserting it. Unlike the Section 603 presumptions, res ipsa amounts to a doctrine involving substantive rights. Prior to the effective date of the Evidence Code, the doctrine did not shift the burden of proof, but nevertheless was given special weight since it was accorded the status of evidence. See, e.g., BAJI 206, 206-B (4th ed), as these instructions existed prior to the effective date of the Evidence Code.

See also:

Di Mare v. Cresci, 58 Cal. (2d) 292, 23 Cal. Rptr. 772 (approving above noted BAJI instruction)

Seffert v. Los Angeles Transit Lines, 56 Cal. (2d) 498, 15 Cal. Rptr. 161, 163 (approving instruction that the res ipsa loquitur inference "is a form of evidence.")

Druzanich v. Criley, 19 Cal. (2d) 439, 122 p. (2d) 53, 56

Ales v. Ryan, 8 Cal. (2d) 82, 64 p. (2d) 409, 417 ("... the inference of negligence which is created by the rule res ipsa loquitur is in itself evidence which may not be disregarded by the jury").

St. Clair v. McAlister, 216 Cal. 95, 13 p. (2d) 924, 926

Gerhard v. Fresno Medical Group, 217 C. A. (2d) 353, 31 Cal. Rptr. 633, 638

(The introductory comment of the Law Revision Commission [at p. 2] indicates doubt as to whether res ipsa was evidence prior to the Evidence Code. As we interpret the foregoing authorities, we do not believe any question exists but that res ipsa was evidence and was accorded that status because of the special importance of the doctrine.

We think it plain that the res ipsa rule does not deal merely with facilitation of proof, but also embraces substantive rights and expresses a social - and hence "public"-policy, as that phrase is used in Sections 603 and 605 of the Evidence Code.

Thus, while the Committee on Standard Jury Instructions,

Civil has classified res ipsa as a Section 603 presumption, pending clarification by the judicial decision or legislation (See 2 BAJI, 1967 Supp. pp. 42, et seq, comments to BAJI 206), said Committee recognizes that the reason for the principles is "the humane and merciful function of enabling a plaintiff to have his 'day in court' in circumstances which, otherwise, would deny him that opportunity." 2 BAJI 623 (Main Volume). Said committee also stated that said doctrine "has come now to have a spirit and purpose kindred to that of a policy of equity . . . the doctrine is one of the best examples in our jurisprudence of kindly understanding, humaneness, resourcefulness, adaptability and an enlightened viewpoint." 2 BAJI 626 (Main Volume).

The comments of the Courts also establish that the res ipsa doctrine involves "some" public policy other than facilitation of proof.

In Ybarra v. Spangard, 25 Cal. 2d 486, 154 p. 2d 687, the Supreme Court noted that "the particular force and justice of the rule . . . consists of the circumstances that the chief evidence of the true cause, whether culpable or innocent is . . . inaccessible to the injured person . . ." (154 p. 2d at p. 689). The Court further stated that the doctrine is necessary "to avoid gross injustice." (154 p. (2d) at p. 689).

In Ales v. Ryan, supra, 8 Cal. (2d) 82, 64, p. (2d) 409, the Supreme Court stated that the doctrine "will . . . give to a helpless unconscious patient an assurance of the laws solicited in his behalf." (64 p. 2d at p. 417). The Court rejected the contention that defendant's acts constituted negligence per se, stating, in effect, that it was unnecessary to so hold because the doctrine of res ipsa loquitur affords "an adequate and reasonable remedy in this class of cases." (64 p. 2d at p. 420).

See also:

Fowler v. Seaton, 61 Cal. (2d) 681, 39 Cal. Rptr. 88, 884-885.

The inexorable intertwining of social policy and substantive rights with the doctrine of res ipsa loquitur is cogently illustrated in such cases as Clark v. Gibbons, 66 Cal. 2d 399, 58 Cal. Rptr. 125. In that case, Mr. Justice Tobriner, in his concurring opinion, noted that the doctrine of res ipsa loquitur was utilized "(i) in pursuing the laudable goal of shifting the losses occasioned by ... accidents to the parties best able to protect against them through insurance." (58 Cal. Rptr. at p. 135).

Chief Justice Traynor in his concurring and dissenting opinion feared that expansion of the doctrine "places too great a burden on the medical profession and may result in an undesirable limitation on the use of procedures involving inherent risks of injury even when due care is used." (58 Cal. Rptr. at p. 142). The majority opinion approved the use of the doctrine in that case. The effect of the doctrine on social policy -- the issue of shifting losses and the issue of the best rule for improving the quality of medical care -- can thus be seen to have an important bearing on the scope and weight of the doctrine.

We have noted that the BAJI Committee has accorded the doctrine Section 603 treatment, although the comments of the Committee support Section 605 treatment. We believe that Section 603 treatment was accorded because the doctrine has never been held to shift the burden of proof. However, as noted above, the doctrine has always been accorded special weight, since the presumption or inference has been treated as evidence. The issue is whether -- because of the repudiation of the "presumption is evidence" rule -- res ipsa is now to be weakened by placing it in the category of the simple proof items currently embraced within Section 603 or strengthened by classification as

a Section 605 presumption. If the Commission does not see fit to recommend strengthening the doctrine by according it Section 605 treatment, we submit that neither should it recommend weakening the doctrine. Such weakening would have substantive effects on important social policy and should be accorded a full scale review either by the Courts or the Legislature. The proposal here -- casting the change as a procedural or evidentiary problem -- does not mention, sift or explore the questions of accident prevention, risk spreading, promotion of safety and the like which will be affected by any change in the doctrine.

b. The second sentence of proposed Section is misleading and ambiguous.

The second sentence of proposed Section 646 makes it mandatory that, on request, the court instruct the jury as to any "inference" it may draw from "such evidence," meaning evidence introduced by the party against whom the presumption operates. We fail to see where any "inference" is involved with respect to the party against whom the presumption operates. That is the party with superior knowledge of the facts, who should be able to produce direct evidence. If such party produces circumstantial evidence requiring the drawing of inferences, such inferences should not be entitled to any special weight merely because they are in rebuttal to a res ipsa showing -- at best, they should be accorded the same treatment they would be conceded in any other type of case. It does not seem to us that the explanatory comment clears up this issue.

The second sentence of Section 646 is also, in our opinion, objectionable because it appears to create some ambiguity as to whether an inference may always be drawn from the facts giving rise to the res ipsa presumption. We submit that the inference must be drawn where facts that give rise to the presumption exist and the sentence should so state.

c. With respect to the explanatory comment

Since we disagree with the categorizing of res ipsa as a Section 603 presumption for the reasons outlined under "1" above, we take exception to most of the comment. We will, however, address ourselves to the comment on the suumption arguendo that res ipsa should be classified as a Section 603 presumption.

Our basic disagreement goes to the statements on p. 6 and p. 7 that deal with the situation where evidence is introduced to rebut the presumption of res ipsa loquitur. Therein, it is stated that the court must instruct the jury that it may infer from the established facts that negligence on the part of the defendant was a proximate cause of the accident. It is then stated:

> "The instruction should make it clear, however, that the jury should draw the inference only if, after weighing the circumstantial evidence of negligence together with all of the other evidence in the case, it believes that it is more likely than not that the accident was caused by the defendant's negligence."

And, at page 7, it is stated:

> "The jury should draw the inference, however, only if it believes after weighing all of the evidence that it is more likely than not that the defendant was negligent and the accident actually resulted from his negligence."

As we see it, the effect of these proposed instructions would be to emasculate the doctrine of res ipsa loquitur in any case where the party against whom the doctrine operates introduces rebuttal evidence.

We submit that if the basic facts that give rise to the presumption are established, it is mandatory that the jury draw the inference of negligence. The quoted comments make it merely optional for the jury to draw the inference. This, in effect, demolishes the doctrine and reduces it to a rule of circumstantial evidence with no more weight than any other type

of circumstantial evidence. Under the existing law, we believe that if the facts giving rise to the inference are established, the inference must be drawn as a matter of law and it is then incumbent on defendant to meet or balance it by the specific proof outlined in the present BAJI 206.

Thus, the present BAJI 206 (1967 Revision) instruction assumes that the res ipsa doctrine will be a Section 603 presumption. That instruction reads as follows:

> "From the happening of the accident involved in this case, an inference may be drawn that a proximate cause of the occurrence was some negligent conduct on the part of the defendant."
>
> "If you draw such inference of defendant's negligence, then, unless there is contrary evidence sufficient to meet or balance it, you will find in accordance with the inference."
>
> "In order to meet or balance such an inference of negligence, the evidence must show either (1) a definite cause for the accident not attributable to any negligence of defendant, or (2) such care by defendant that leads you to conclude that the accident did not happen because of defendant's lack of care but was due to some other cause, although the exact cause may be unknown. If there is such sufficient contrary evidence you shall not find merely from the happening of the accident that a proximate cause of the occurrence was some negligent conduct on the part of the defendant."
>
> (Emphasis supplied)

Even this instruction is objectionable, in our view, since we believe the inference must be drawn and the contrary evidence weighed against it. However, it does, we believe, clearly set forth the manner in which the law should be applied and does not, as do the Commission's comments above quoted, emphasize that the jury's power to draw the inference has no weight other than as ordinary circumstantial evidence.

Respectfully submitted,

The following constitutes the comments of the California Trial Lawyers Association Legislative Committee on Senate Bill No. 351 and the memorandum of Dr. David S. Rubsamen of the California Medical Association.

With respect to Senate Bill No. 351:

1) The first sentence of Senate Bill No. 351 classifies res ipsa loquitur as "only" creating a rebuttable presumption affecting the burden of producing evidence. We are opposed to that classification. We believe that res ipsa loquitur should be classified as a presumption affecting the burden of proof, as defined in Sections 605 and 606 of the Evidence Code. Presumptions affecting the burden of producing evidence are presumptions established to implement "no public policy other than to facilitate the determination of the particular action in which the presumption is applied." Section 603, Evidence Code. Presumptions so classified by the Evidence Code at the present time include the following:

a) Presumptions dealing largely with the facilitation of specific items of proof in connection with elementary evidence problems common to collection or commercial matters, such as that money delivered by one to another is presumed to have been due to the latter (Evidence Code Section 631), an obligation delivered up to the debtor is presumed to have been paid (Evidence Code Section 633), payment of earlier rent or installments is presumed from a receipt for later rent or installment (Evidence Code Section 636). See also Evidence Code Sections 632, 634, 635, 637.

b) The presumption that one exercising acts of ownership over property is the owner (Section 638).

Exhibit "A"

c) The presumption that a writing is truly dated (Section 640).

d) The presumption of authenticity of ancient documents (Section 643).

e) The presumption that certain books and reports of cases are correct (Sections 644-645).

See also: Evidence Code, Section 639, 642.

We believe that the res ipsa loquitur doctrine is on a much higher level than the present statutorily classified Section 603 presumptions affecting the burden of producing evidence. Prior to the passage of the Evidence Code that doctrine was given special weight, since the doctrine was accorded the status of evidence (See, e.g., DiMare v. Cresci, 58 Cal. 2d 292, 23 Cal. Rptr. 772, Seffert v. Los Angeles Transit Lines, 56 Cal. 2d 498, 15 Cal. Rptr. 161, 163, Ales v. Ryan, 8 Cal. 2d 82, 64 p. 2d 409, 417). The Evidence Code abolished the concept that a presumption is evidence. See, e.g., Evidence Code Section 600(a). But it has been left open as to whether res ipsa loquitur should now be a presumption affecting the burden of producing evidence or a presumption affecting the burden of proof.

We believe that the res ipsa doctrine comes within those classes of presumptions that are established to implement some public policy other than to facilitate the determination of the particular action, as defined in Evidence Code Section 605. The doctrine "has come now to have a spirit and purpose kindred to that of a policy of equity." 2 BAJI 626 (Main Volume).

We believe that in our present complex, industrial society the goals of risk spreading and promotion of safety require that the doctrine of res ipsa be strengthened and certainly not that it should be weakened. (We are currently preparing a more detailed review of our position for the Law Revision Commission, which is studying the question currently. We shall be happy to forward same upon completion).

For these reasons, we object to the first sentence of proposed Section 603 of the Evidence Code.

2) With respect to the last two sentences of proposed Section 603, as set out in Senate Bill No. 351:

As applied to medical malpractice cases (and it should be noted that the section is not limited to such cases), it would virtually abolish the res ipsa loquitur doctrine. It is difficult to conceive of a medical procedure of any importance where "a calculated risk of accidental injury" is not present. Certainly, it is the type of medical procedure where such calculated risk of accidental injury is present which is likely to cause the most harm to innocent patients. And the rarity of accidents in the absence of negligence in itself is an indication that malpractice has occurred, and has caused the injury. If the doctrine is not to apply to rare accidents, certainly it will not apply where the accident is not rare, and then it seems to us that the doctrine becomes virtually extinct.

The last sentence of proposed Section 603 adds the element that even where (1) there is a rare accident, (2) associated with a calculated risk of occurrence, and the plaintiff is able to show some specific proof of negligence, the doctrine shall not apply. This appears to require that the doctrine will never be applied even where the patient could show negligence along with the elements of res ipsa loquitur.

The statute would thus, by virtually repealing the res ipsa loquitur doctrine, to all intents and purposes abolish medical malpractice actions in almost all cases. It would apply only to cases of minor treatment where no calculated risk of accidental injury is present. As the Supreme Court said in Ybarra v. Spangard, 25 Cal. 2d 486, 154 p. 2d 687, the doctrine is necessary "to avoid gross injustice." (154 p. 2d at p. 689). We believe that gross injustice would result from the rule set

forth in Senate Bill No. 351.

With respect to Dr. Rubsamen's letter:

Essentially, as we understand it, the doctor is of the opinion that the rarity of an accident should not permit the use of the res ipsa rule, even when combined with some evidence of negligence (See, e.g., pp. 4 and 5 of the Doctor's letter). We do not believe that any such general rule should be made, for the reasons discussed above.

While Dr. Rubsamen does not cite the cases to which he refers, we believe that the case originally setting forth the rules of which the Doctor complains is Quintal v. Laurel Grove Hospital, 62 Cal. 2d 154, 41 Cal. Rptr. 577, decided in 1964. In that case, Reginald Quintal, a 6 year old child, entered the hospital for a minor operation to correct an inward deviation of his eyes. During the course of administration of the anesthetic, cardiac arrest occurred and, although plaintiff was resuscitated, as a result of brain damage occurring during the period that the boy's heart had stopped, the boy became a spastic quadriplegic, blind and mute.

The jury found for plaintiff in the sum of $400,000, a reasonable sum under the circumstances.

It was shown that the day before the operation, the boy was apprehensive and agitated, and had an elevated temperature. Some of the hospital records regarding the boy's temperature just before the operation had been altered. After the alteration, these records reflected a normal temperature at that time. During the operation, the boy's heart stopped beating and the surgeon performing the operating did not feel qualified to open the boy's chest and massage his heart. The surgeon left to get help, and fortunately found a surgeon who was able to do the heart massage and thus save the boy's life. But, as noted, because of the period of time that had elapsed, the boy suffered the injuries described above.

Plaintiff was apparently unable to secure an expert

witness and had to call the defendant doctors as witnesses, and to rely on the doctrine of res ipsa loquitur.

The Supreme Court noted that cardiac arrest is a "known and calculated risk in the giving of a general anesthetic." 41 Cal. Rptr. at p. 580. It can be caused by negligence or by unknown and hidden idiosyncracies of the body. The exact cause in the case of Reginald Quintal was unknown.

However, apprehension and rising temperature, such as was exhibited by the boy, are danger signals when a general anaesthetic is to be administered. The operation was not an emergency surgery, but an elective one. 41 Cal. Rptr. at p. 581.

The quoted language appears to set forth the rules to which Dr. Rubenmen objects and at which Senate Bill No. 351 is aimed.

In the Quintal case, in addition to the uncompensable and indescribable heartbreak and torture that the boy and his parents will undergo the rest of their lives, they were also faced with enormous future expenses in the care and treatment of the boy. Yet the Courts were extremely solicitous of the rights of the defendant doctors. The verdict was not permitted to stand. A new trial had been ordered by the trial court and that order was affirmed by the Supreme Court. The case was given serious and painstaking attention. The justices were split, but it was agreed by 5 justices that in view of the danger from cardiac arrest and in view of the inability of the surgeon in charge to perform the open heart surgery, some other doctor should have been immediately available to perform the open heart surgery on the boy, in the event of just such a mishap as did occur. We trust that as a result of this case-- which we understand has been criticized severely by the medical profession-- such a procedure is now standard. To this extent it seems clear that "legal considerations" correctly and aptly color medical judgments

The Supreme Court said:

[6-8] The facts of the present case present a clear situation where the conditional doctrine of res ipsa applies. If the jury finds certain facts, which they are entitled to find from the evidence, then the doctrine applies. Here we have an injury which is very rare. It is an injury that could result from negligence, or could result without negligence. Is it more probable than not that it was the result of negligence? That is the question. The plaintiffs, out of the mouths of defendants and their witnesses, proved that the injury could occur as a result of negligence. There is also evidence that the injury could occur without negligence. In such circumstances the jury should be instructed that if they find certain facts to be true they should apply the inference involved in res ipsa. Here we have an injury that is a *known risk* and rarely occurs. We have the instrumentality and the procedures involved completely in the control of defendant doctors. We have the boy under an anesthetic. Certainly the facts called for an explanation. The defendants explained what they did and testified that this was due care. But there was testimony that 90 per cent of the deaths resulting from cardiac arrest occurred by reason of faulty intubation. There was testimony that would justify the jury in inferring that if the operation had been performed within three minutes of the heart stoppage brain damage would not have resulted. We have the evidence that temperature and apprehension increase the risk. We have the evidence of the erasures on the temperature chart. Under these circumstances the jury could find that it is more probable than not that the injury was the result of negligence. That is the test.

As stated in Fowler v. Seaton, 61 A.C. 740, 746, 39 Cal.Rptr. 881, 884, 394 P.2d 697, 701:

"It is our opinion that the jury could find that the doctrine of res ipsa loquitur applies under the facts here involved. Generally, that doctrine applies 'where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' (Siverson v. Weber, 57 Cal.2d 834, 836, 22 Cal.Rptr. 337, 372 P.2d 97; accord Faulk v. Soberanes, 56 Cal.2d 466, 470, 14 Cal.Rptr. 545, 363 P.2d 593; Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 446, 247 P.2d 344.) * * *

"One of the frequently quoted statements of the applicable rules is to be found in the opinion of Chief Justice Erle in Scott v. London & St. Katherine Docks Co. (1865) 3 H. & C. 596, quoted in Prosser on Torts (2d ed. 1955) section 42, at page 201, as follows: 'There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.'

"Of course, negligence and connecting defendant with it, like other facts, can be proved by circumstantial evidence. There does not have to be an eyewitness, nor need there be direct evidence of defendant's conduct. There is no absolute requirement that the plaintiff explain how the accident happened. Res ipsa may apply where the cause of the injury is a mystery, if there is a reasonable and logical inference that defendant was negligent, and that such negligence caused the injury. (Prosser on Torts, supra, at p. 204.)"

It is true that in Siverson v. Weber, 57 Cal.2d 834, 836, 22 Cal.Rptr. 337, 372 P.2d 97, the court affirmed a nonsuit in favor of a surgeon where the medical experts all testified that they could not determine the cause of the fistula there involved, and that fistulas do occur although due care is used. There is similar testimony here. The court in Siverson, supra, listed the usual causes of such injury and then stated (p. 838, 22 Cal.Rptr. p. 339, 372 P.2d p. 99):

"There is nothing to indicate that if the fistula was caused by any of the factors listed above or any combination of them the injury sustained by plaintiff was a result of negligence." And again at page 839, 22 Cal. Rptr. at page 339, 372 P.2d at page 99: "No medical witness testified that in the rare cases where fistulas occur they are more probably than not the result of negligence." The court emphasized that the fact a particular injury is a rare occurrence does not in itself prove that the injury was probably caused by negligence.

Each case, of course, must be determined on its own facts. Here the facts are somewhat similar to those in Davis v. Memorial Hospital, 58 Cal.2d 815, 26 Cal.Rptr. 633, 376 P.2d 561. There a rectal abscess occurred after an enema. There was medical evidence that 90 per cent of all such abscesses result from bacterial infection, that a mucous membrane normally prevents such infection, and that in the medical expert's opinion the insertion of the enema tube caused the break. There was other expert testimony that the abscess was not so caused and probably resulted from other causes. After referring to the rule stated in Siverson v. Weber, supra, 57 Cal.2d 834, 836, 22 Cal.Rptr. 337, 372 P.2d 97, above quoted, the court in Davis stated (58 Cal.2d p. 817, 21 Cal.Rptr. p. 634, 376 P.2d p. 562): "Where the evidence is conflicting or subject to different inferences as to a fact necessary to the applicability of the doctrine, for example, as to whether an accident claimed by the plaintiff happened or whether an injury was caused by the conduct of the defendant rather than by the acts of someone else, the question of fact must be left to the jury under proper instructions. [Citations.]" The court held that res ipsa instructions on a conditional basis should have been given.

The evidence in the present case, although not as strong as in Davis, is nevertheless sufficient to warrant conditional instructions on res ipsa. Dr. Cullen did testify that 90 per cent of the deaths occurring in patients under anesthesia from cardiac arrests were due to improper management of the airway. There was also testimony that exposure of an improperly premedicated patient to anesthesia not infrequently precipitates responses which endanger the life of the patient; that agitation and apprehension of the patient are danger signals; that the temperature of the patient is important, and normally, in an elective operation, anesthesia should not be given for 72 hours after the temperature becomes normal; and that failing to keep the tissues adequately oxygenated is the forerunner of many anesthetic complications. All of these, obviously, could involve negligence. It was for the jury to say whether it was more probable than not that any of them did. Thus, on the new trial, the jury should be instructed on this doctrine.

41 Cal.Rptr. at pp. 58
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and that such considerations patently have a salutary social effect, contrary to Dr. Rubsamen's statements at p. 3 of his letter.

To reverse these principles would, in our judgment, promote a lack of safety. It would encourage doctors to attempt procedures that they are not able to handle, just as occurred in the Quintal case.

We are unable to comment further on Dr. Rubsamen's opinion that legal rules have affected medical safety, since he has not gone into detail concerning situations which might establish that fact. If and when such cases do occur, we believe they should be studied carefully. However, we do not believe that our courts will fasten liability on the medical profession by reason of medical decisions made solely for medical reasons, as suggested by Dr. Rubsamen at page 3 of his letter.

For all of the foregoing reasons, we are opposed to Senate Bill No. 351.

BRIEF IN OPPOSITION

TO

SENATE BILL 351

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I. INTRODUCTION

The rationale supporting the application of the doctrine of res ipsa loquitur in the field of medical malpractice is persuasive. Medical matters are inherently complex. Often the plaintiff is unconscious when the injury occurs.[1] Consequently, the plaintiff frequently lacks knowledge of what happened, whereas the defendant, who was originally in control of the potential causes of the accident, possesses either a superior knowledge of what happened or the best opportunity to obtain it.[2] Moreover, a special relationship exists between a physician and his patient whereby the former undertakes a special responsibility for the safety of the latter.[3] These factors, when combined with the tendency of physicians to refuse to testify against one another, present a strong argument for allowing the plaintiff greater latitude in his trial presentation. This view has been increasingly reflected in the recent decisions of the California Supreme Court,[4] and it is this trend which the proposed Section 608 of the Evidence Code is designed to curb.

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1 See Binder, "Res Ipsa Loquitur In Medical Malpractice," 17 Clev.-Mar. L. Rev. 218, 219 (1968)

2 See Comment, "Medical Malpractice---Res Ipsa Loquitur and Informed Consent In Anesthesia Cases," 16 De Paul L. Rev. 432, 438 (1967)

3 See Prosser, "Res Ipsa Loquitur In California," 37 Cal. L. Rev. 183, 223 (1949)

4 See Clark v. Gibbons, 66 Cal.2d 399, 58 Cal. Rptr. 125 (1967); Quintal v. Laurel Grove Hosp., 22 Cal. 2d 154, 41 Cal. Rptr. 577 (1964)

II. CONDITIONS OF RES IPSA LOQUITUR

Res ipsa loquitur is a doctrine of circumstantial evidence which permits the jury to infer negligence from the mere occurrence of the accident itself when certain conditions are met.[5] First, the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence. Second, the accident must be caused by an agency or instrumentality within the exclusive control of the defendant. Third, the accident must not have been due to any voluntary action on the part of the plaintiff. Fourth, evidence as to the true explanation of the accident must be more readily accessible to the defendant than to the plaintiff.[6] However, this factor, although often mentioned by the courts, is not an essential condition to the application of the doctrine.[7] Moreover, since the third condition is seldom important in medical malpractice cases, res ipsa loquitur, as a general rule, applies where the nature of the accident is such "that it can be said, in light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible."[8]

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5 See Ybara v. Spangard, 25 Cal.2d 486, 489, 154 P.2d 687, 689 (1944)

6 See Binder, supra note 1, at 219

7 See Prosser, supra note 3, at 222

8 Davis v. Memorial Hospital, 58 Cal. 2d 815, 817, 26 Cal.Rptr 633 (1962)

A. LAYING THE FOUNDATION

1. Lay Knowledge

Traditionally the jury could only conclude whether such probabilities existed on the basis of lay common knowledge.[9] This restriction limited the utility of the doctrine to cases where the accident was clearly one which would not occur in the absence of negligence and the responsibility of any other person than the defendant was clearly excluded.[10] Examples of such cases included injuries resulting from foreign objects being left in a patient's body after an operation or from removal of the wrong part of the patient's body.[11] On the other hand, the doctrine was ordinarily considered inapplicable where a mistaken diagnosis was made,[12] where a wrong method of treatment was chosen, or where the accident occurred in a substantial percentage of cases in spite of all reasonable caution being exercised.[13] However, the difficulty in distinguishing between cases precluded a uniform application of the doctrine. It was the court's responsibility to determine initially whether the jury was capable of passing on the question

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9 Engelking v. Carlson, 13 Cal2d 216, 221, 88 P.2d 695, 698 (1939)

10 See Prosser, supra note 3, at 220

11 18 Hast. L. Rev. 691, 692 (1967)

12 Cf. Friedman v. Diesel, 139 Cal.App. 2d 333, 293 P.2d 488 (1956)

13 See Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695 (1939)

of whether or not the probabilities of negligence existed on the basis of the facts. If so, the jury was instructed on the conditions of res ipsa loquitur; if the court concluded the jury could not handle the question, res ipsa loquitur instructions were not given. This initial decision by the court was tantamount to a determination of whether the accident took place with or without negligence. It required the court not only to substitute its judgment for that of lay common knowledge, but also to consider the merits of plaintiff's claim.[14]

2. Expert Testimony

Gradually the use of expert testimony from which the jury could base its conclusion as to the probabilities of defendant's negligence was accepted.[15] Although this development greatly expanded the scope of the doctrine, courts generally refuse to give res ipsa loquitur instructions in a complex medical situation beyond the understanding of lay common knowledge unless the plaintiff produces some expert testimony to the effect that it is common knowledge among experts that the given injury would not occur absent negligence.[16] The rationale for this requirement is

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14 Comment, "Negligence--Res Ipsa Loquitur--Application To Malpractice Actions," 60 Mich. L. Rev. 1153, 1162 (1962)

15 Siverson v. Weber, 57 Cal.2d 834, 836, 372 P.2d 97 (1962)

16 Meier v. Ross General Hosp., 69 A.C. 429, 437 71 Cal.Rptr. 903, 909 (1968)

expressed in Tomei v. Henning, 67 Cal.2d 319, 322, 62 Cal.Rptr. 9, 11 (1967):

> "Since the question whether, in the light of past experience, the accident was probably the result of negligence is not a matter of common knowledge among laymen, expert testimony is necessary to determine whether a probability of negligence appears from the happening of the accident. When such test is relied upon to establish that probability, it need not be in any particular language. It need only afford reasonable support for an inference of negligence."

Moreover, "the law has never held a physician or surgeon liable for every untoward result which may occur in medical malpractice."[17] It demands only that

> "a physician or surgeon have the degree of learning and skill ordinarily possessed by practioners of the medical profession in the same locality and that he exercise ordinary care in applying such learning and skill to the treatment of his patient... Ordinarily, a doctor's failure to possess or exercise the requisite learning or skill can be established only by the testimony of experts."[18]

When faced with the "conspiracy of silence" among physicians, this requirement can become a serious difficulty. To counteract this obstacle, the plaintiff can call the defendant physician and make him plaintiff's expert witness for purposes of this requirement.[19] Furthermore, the requirement disappears if "during the performance of surgical or other skilled operations an ulterior act or ommission

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17 Engelking v. Carlson, 13 Cal.2d 216, 220, 88 P.2d 695 (1939)

18 Lawless v. Calaway, 24 Cal.2d 81, 86, 147 P.2d 604, 606 (1944)

19 Evid. Code, Section 776

occurs, the judgment of which does not require scientific opinion to throw light upon the subject."[20] As stated recently by the California Supreme Court:

> "We hold the trial court must submit a conditional res ipsa instruction, even absent expert testimony on the 'probabilities of negligence,' when the evidence supports a conclusion that the cause of the accident was not inextricably bound up in the course of treatment involving the exercise of medical judgment beyond the common knowledge of laymen."[21]

B. FIRST CONDITION

Considerable confusion exists as to what constitutes sufficient evidence to lay the foundation for res ipsa loquitur. Courts have been increasingly liberal in establishing the requirements necessary to meet the first condition. It is this development which has prompted S.B.351. At one time the plaintiff was unable to obtain the benefit of the doctrine where the injury was a calculated risk of the operation itself. Thus, in Engelking vs. Carlson, 13 Cal.2d 216, 88 P.2d 695 (1939), a showing by expert testimony that the peroneal nerve was cut in 5 to 9 per cent of the operation similar to that of the plaintiff's was held sufficient to deny plaintiff any damages:

> "Probably in every operation there is some hazard which the medical profession recognizes and guards against but which is not always overcome. To say that the doctrine of res ipsa loquitur allows the

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20 Ales vs. Ryan, 8 Cal.2d 82, 98, 64 P.2d 409, 417 (1936)

21 Meier vs. Ross General Hosp., 69 A.C. 429, 440, 71 Cal. Rptr. 903, 911 (1968)

> recovery of damages in every case where an injury does not ordinarily occur, would place a burden upon the medical profession which the law has not heretofore laid upon it. Moreover, such a rule is not justified by either reason or authority."[22]

The first departure from Engelking occurred in Cavero vs. Franklin General Benevolent Society, 36 Cal.2d 301, 223 P.2d 471 (1950), a case in which a child died during a tonsillectomy. Since the accident was sufficiently rare, the court held that the jury could apply res ipsa loquitur on the basis of the lay common knowledge test. Thus, rarity alone was deemed an adequate substitute for evidence tending to show that the accident was probably due to the defendant's negligence.[23] This substitution formed the basis of the dissent:

> "The court in effect holds that solely because an accident is rare it was more probably than not caused by negligence. There is a fatal hiatus in such reasoning. The fact that an accident is rare establishes only that the possible causes seldom occur. It sheds no light on the question of which of the possible causes is the more probable when an accident does happen.... There was nothing in the expert testimony relied upon in the majority opinion to support a conclusion that ordinarily deaths do not occur in the course of tonsillectomies in the absence of negligence.... Her testimony establishes only that such accidents are rare."[24]

The rarity principle was criticized in Siverson v. Weber, supra. Following a hysterectomy, plaintiff developed a fistula. Recognizing that a fistula was a rare occurrence in such an operation,

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22 Engelking v. Carlson, 13 Cal.2d 216, 220, 88 P.2d 695, 697 (1939)

23 15 Stan. L. Rev. 77, 81 (1963)

24 Cavero vs. Franklin General Benevolent Society, 36 Cal.2d 301, 313-14, 223 P.2d 471, 479 (1950)

the court nevertheless dismissed the importance of rarity, saying instead, as did the court in Engelking, that the injury was an inherent or calculated risk of the operation which could not be diminished by the exercise of due care:

> "The fact that a particular injury suffered by a patient as a result of an operation 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 the 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."[25]

Thus, where an injury is apt to occur even in the presence of utmost care, the calculated risk principle holds that res ipsa loquitur is inapplicable, since it cannot be said that the likelihood of negligence exceeds the risk involved.[26] The risk itself must involve a specific injury resulting from a specific medical procedure, and the mere fact that such injury is rare does not by itself give rise to an inference of negligence from which res ipsa loquitur can be applied.[27]

Restoration of the calculated risk principle was brief. In Quintal vs. Laurel Grove Hospital, 22 Cal.2d 154, 41 Cal.Rptr. 577 (1964), a boy suffered a cardiac arrest during the administration of an anesthetic and before eye surgery. The opthamologist,

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25 Siverson v. Weber, 57 Cal.2d 834, 839, 372 P.2d 97, 99-100 (1962)

26 20 S. Cal. L. Rev. 80, 84 (1956)

27 Id.

incompetent to perform a heart massage, rushed out of the operating room and found a general surgeon who subsequently performed the emergency operation, but not before the boy had received severe brain damage. Since possible causes of cardiac arrests are not a matter of lay common knowledge, expert testimony would normally have been required to show that negligence is more probably than not the cause of a cardiac arrest which occurs under similar circumstances. The plaintiff failed to lay this foundation, but the court did not find this lack of testimony fatal. It was held sufficient for the plaintiff to show that when due care is used, such accident does not ordinarily, but can, occur.[28] Since a cardiac arrest was a rare occurrence which "could" have been caused by negligence, the court concluded that a res ipsa loquitur case was established, notwithstanding its admission that a cardiac arrest was also a calculated risk in administering a general anesthetic.[29] To support this conclusion, the court relied additionally on the specific acts of negligence of the defendant in not being able to perform the heart massage and in not having another surgeon present who could perform such an operation, although neither of these facts tended to explain the cause of the cardiac arrest itself. They were, however, adequate by themselves to establish a prima facie case of negligence.[30]

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28 Quintel vs. Laurel Grove Hosp., 22 Cal.2d 154, 164, 41 Cal.Rptr. 577, 583 (1964)

29 18 Hast. L. Jl. 691, 698 (1967)

30 Id., at 696

The approach of Quintal was recently approved in Clark vs. Gibbons, 66 Cal.2d 399, 58 Cal.Rptr. 125 (1967), a case in which the plaintiff had suffered osteoarthritis in her ankle joint as a consequence of defendant's decision to terminate open reduction surgery before its completion because the anesthesia was wearing off prematurely. Sufficient evidence of negligence existed to support the plaintiff's verdict independent of res ipsa loquitur, but the court still found instructions on the doctrine proper since the evidence of negligence was accompanied by expert testimony that if due care is exercised, anesthesia rarely wears off prematurely.[31] The court did retreat from Quintal, however, by holding that Quintal applied only if rare injury is accompanied by "proof of specific acts of negligence of a type which could have caused the occurrence complained of."[32] As the court explains:

> "The likelihood of a negligent cause is increased if the low incidence of accidents when due care is used is combined with proof of specific acts of negligence of a type which could have caused the occurrence complained of. When those two facts are proved, the likelihood of a negligent cause may be sufficiently great that the jury may properly conclude that the accident was more probably than not the result of someone's negligence.
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> "That a doctor has done a negligent act of a type that could have caused the accident which does not ordinarily occur in the exercise of due care, greatly increases the probability that it was his negligence that caused the plaintiff's injury. Thus, the low incidence of accidents when due care is used plus negligent conduct of a type which could have caused the occurrence may make it probable that the occurrence was the result of someone's negligence and that the defendant is probably the

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31 55 Cal. L. Rev. 1193, 1194 (1967)

32 Clark vs. Gibbons, 66 Cal.2d 399, 413, 58 Cal.Rptr. 125, 134 (1967)

Person who was responsible. Those are the requirements for applying res ipsa loquitur."[33]

Although Quintal and Clark stop short of the simple rarity principle enunciated in Cavero, the plaintiff presently is entitled to the benefits of the doctrine so long as the injury is rare and might occur as a result of negligence, notwithstanding either the absence of a basis of experience, either lay or expert, that when an injury does occur, it is probably the result of negligence, or the presence of evidence that the injury is an inherent risk.[34]

Prior to the Quintal[35] and Clark decisions, specific acts of negligence were generally disregarded in deciding whether or not the res ipsa instruction should be given.[36] The rationale supporting this position are twofold. First, where facts themselves disclose the cause of the accident, there can be no room for an inference. Second, if the plaintiff has specific proof as to just what happened, there is no reason to invoke the doctrine on the basis that the defendant has superior knowledge of the cause of the accident.[37] Noting the majority's reliance on specific negligent acts in Quintal, Chief Justice Traynor believed it to be irrelevant that

"there may be facts other than the occurrence itself to suggest that the arrest was caused by negligence.

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33 Id.

34 18 Hast. L. Jl. 691, 699 (1967)

35 This decision was followed in Edelman v. Ziegler, 223 Cal.App. 2d 871, 44 Cal.Rptr. 144 (1965) and La Mere v. Goren, 223 Cal. App. 2d 799, 43 Cal.Rptr. 898 (1965)

36 Dees v. Pace, 118 Cal.App. 2d 284, 290, 257 P.2d 756, 759 (1953)

37 Prosser, Supra note 3, at 213

> 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 a cardiac arrest alone."[38]

In his view the only relevant question was whether or not the evidence offered by expert testimony showed that when cardiac arrests to occur, they are more probably than not caused by negligence.[39] Nevertheless, res ipsa loquitur was permitted in Wolfsmith v. Marsh, 51 Cal.2d 832, 337 P.2d 70 (1959) and Salgo vs. Leland Stanford University, 154 Cal.App. 2d 560, 317 P.2d (1957) on the basis of evidence showing particular deviations from the degree of skill ordinarily exercised by physicians and surgeons in the community.[40] Moreover, the court in Crawford vs. County of Sacramento, 239 Cal. App. 2d 799, 43 Cal. Rptr. 898 (1965), impressed by the lack of direct evidence of negligence, refused to give res ipsa instructions. That the use of expert testimony to establish a negligent cause, when supported by evidence of the rarity of the accident, constitutes a more liberal interpretation of the doctrine of res ipsa loquitur is recognized in Meier vs. Ross General Hospital, 69 A.C. 429, 71 Cal.Rptr. 903 (1968), a decision

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38 Quintal v. Laurel Grove Hosp., 22 Cal.2d 154, 171, 41 Cal.Rptr. 577, 587 (concurring opinion)

39 Id.

40 18 Hast. L. J1. 691, 697 (1967)

in which both the Quintal and Clark decisions were cited with approval.[41] Certainly where the plaintiff produces such substantial evidence that there is no room for an inference as to the cause of the accident, it is arguable that res ipsa loquitur should disappear, but where the plaintiff only offers some circumstantial evidence suggesting the possible cause, it is equally arguable that the normal inferences of the doctrine should not be defeated. In the latter case, however, a res ipsa loquitur should be applied only to the extent that an inference may be drawn to support the specific proof.[42] It is likely, therefore, that this development marks a permanent change in the conditions necessary to lay the foundation for res ipsa loquitur in California. Whether the impact of this development will bring about a great change in medical malpractice law is uncertain. In a case such as Quintal and Clark where the plaintiff's proof of specific acts of negligence is sufficent to establish a prima facie case of negligence, the doctrine could provide a substantial benefit.[43]

C. SECOND CONDITION

In the usual medical malpractice case the plaintiff has little difficulty in identifying the defendants who are probably responsible for the alleged negligent act. However, if an injured plaintiff claims ignorance of how and by whom his injury was caused, then all parties who may have been in any way in control of

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41 Meier vs. Ross General Hospital, 69 A.C. 429, 71 Cal.Rptr. 903, 910, n. 4 (1968)

42 See Prosser, supra note 3, at 214

43 18 Hast. L. Jl. 691, 697 (1967)

the plaintiff may be liable unless each convinces the jury "either that a specific cause for the accident existed for which he was not responsible or that he exercised due care wherein his failure to do so could have caused the accident."[44] Thus, the defendant has a mandatory "burden of going forward."[45] As stated in Ybarra v. Spangard, 25 Cal.2d 486, 494, 154 P.2d 687, 691 (1944),

> "We merely hold that where a patient 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."[46]

D. THIRD CONDITION

The third condition is seldom an issue in a medical malpractice case, since the patient is usually passive during the course of any medical operation or treatment. Nevertheless, the problem does occasionally arise. In Meier v. Ross General Hospital, 69 A.C. 429, 71 Cal.Rptr. 903 (1968), the decedent, who had been placed in a hospital after an attempted suicide because of his physical injuries and depressed mental state, leaped to his death from a hospital window. The court, which had earlier held in Vistica v. Presbyterian Hospital, 67 Cal.2d 465, 62 Cal.Rptr. 577 (1962) that those charged with the care of a patient who know the

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44 California Law Revision Commission (CLRC), "Tentative Recommendation Relating to Evidence Code--Res Ipsa Loquitur," 4 (1969)

45 See Dierman v. Providence Hosp., 31 Cal.2d 290, 295, 188 P.2d 12, 15 (1947)

46 See Adamson, "Medical Malpractice: Misuse of Res Ipsa Loquitur," 46 Minn. L. Rev. 1043 (1962)

patient might harm himself absent preclusive measures must use reasonable care to prevent such harm, found the trial court in error for refusing to give the following qualifying instruction to the standard conditional res ipsa loquitur instruction:

> "A plaintiff may properly rely on res ipsa loquitur although he (the decedent) participated in events leading to the accident if the evidence excludes his conduct as being the responsible cause."[47]

III. THE PROCEDURAL IMPACT OF RES IPSA LOQUITUR

When these conditions are satisfied,[48] the plaintiff's procedural advantage over the defendant may vary significantly. Traditionally the doctrine of res ipsa loquitur gives rise to a permissive inference from which the jury may infer the defendant's negligence from the plaintiff's case alone.[49] This inference enables the plaintiff to avoid nonsuit, but it is an insufficient

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47 Meier v. Ross General Hosp., 69 A.C. 429, 71 Cal.Rptr. 903 (1968)

48 Should the plaintiff fail to establish these facts, it does not necessarily follow that he has not produced sufficient evidence of negligence to sustain a jury finding in his favor, since the requirements of res ipsa loquitur are merely those that might be met to give rise to the presumption of negligence in the absence of contrary evidence. Burr v. Sherwin Williams Co., 42 Cal. 2d 682, 691, 268 P.2d 1041, 1046 (1954); Ales V. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, 417 (1936). Thus, even though the facts which give rise to the presumption have not been proven by a preponderance of the evidence, the jury may nevertheless conclude from a consideration of all the evidence that it is more likely than not that the defendant was negligent. See CLRC, supra note 44, at 4.

49 Rubsamen, "Res Ipsa Loquitur in California Medical Malpractice Law--An Expansion of a Doctrine to a Busting Point," 14 Stan. L. Rev. 251, 252 (1962)

basis upon which to grant a directed verdict if the defendant offers no evidence.[50] Thus, the defendant has no burden other than the risk that the jury will infer negligence against him; the jury need not draw such inference and may in fact find for defendant even though defendant remains silent.[51] The plaintiff obtains a greater advantage where the jury is required to infer defendant's negligence in the absence of sufficient evidence to the contrary, since the plaintiff is entitled to a directed verdict if the defendant fails to present any evidence.[52] The effect of this inference is to impose a mandatory "burden of going forward" upon the defendant.[53] The doctrine achieves its greatest effect where this burden of proof is shifted from the plaintiff to the defendant. To prevent an unfavorable verdict, the defendant must show by a preponderance of the evidence that the accident was not caused by his negligence.[54]

In assessing the proper effect to be given res ipsa loquitur, one might initially question whether there exists a good reason why the doctrine should do more than get the plaintiff to the jury. Certainly if the accident is clearly one which would not

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50 See Prosser, supra note 3, at 217

51 18 Hast. L. Jl. 691, 692 (1967)

52 See Prosser, supra note 3, at 218

53 Gerhardt v. Fresno Medical Group, 217 Cal.App. 2d 353, 360, 31 Cal.Rptr. 633, 638 (1963)

54 See Prosser, supra note 3, at 218

occur in the absence of negligence and the responsibility of any other person other than the defendant is excluded, then there is little reason for leaving the inference to be made by a jury.[55] A directed verdict for the plaintiff would be appropriate. But such situations are unusual; the usual case requires that a choice be made between conflicting inferences as to which reasonable men can differ.[56] Therefore, the argument is not persuasive by itself that the doctrine should permit the jury to draw more than the traditional inference.[57] Nevertheless, although there has been a lack of uniformity in the past, California courts presently view the doctrine as giving rise to a rebuttable presumption.[58] As

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55 Id., at 220

56 Id., at 221

57 Id.

58 The presumption itself should not be treated as evidence itself, since the presumption as such is nothing more than a rule of law requiring a directed verdict in the absence of sufficient evidence to the contrary and cannot be balanced against contrary evidence. See CLRC, supra note 44, at 2. What is meant by the statement that the presumption is evidence is that the facts which give rise to the presumption remain in the case as circumstantial evidence from which an inference may still be drawn: "whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent," See CLRC, supra note 44, at 4. Nevertheless, the view that a presumption is itself evidence, although widely discredited, was clung to by California courts until its recent repudiation in Section 600 of the Evidence Code. See Smellie v. Southern Pacific Co., 212 Cal. 540, 299 Pac. 529 (1931).

stated in Burr v. Sherwin Williams, 42 Cal.2d 682, 691, 268 P.2d 1041, 1046 (1954);

> "It is our conclusion that in all res ipsa loquitur situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jury should be instructed that, if defendant fails to do so, they should find for plaintiff.

However,

> "This is not to say that a defendant in a res ipsa loquitur case has the burden of proving himself free from negligence.... The general principle is that, where the accident is of such a character that it speaks for itself,... the defendant will not be held blameless except upon a showing either (1) of satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which case no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown."[59]

In the area of medical malpractice the appropriateness of the rebuttable presumption can be justified on several grounds. Not only does the defendant generally have superior knowledge of what happened or the better opportunity to obtain it, he also is in original control of the possible causes of the accident. Moreover, there exists a special relationship between the physician and his patient under which the former assumes a special responsibility for the safety of the latter. Finally, there is a "conspiracy of silence" among physicians which significantly inhibits plaintiff's investigation of his injuries.[60]

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59 Dierman v. Providence Hosp., 31 Cal.2d 290, 295, 188 P.2d 12, 15 (1947)

60 See Prosser, supra note 3, at 222-23

There are four varying sets of circumstances under which the doctrine of res ipsa loquitur may be applicable.[61] First, where the basic facts giving rise to the presumption are established as a matter of law and the defendant fails to introduce evidence sufficient to support a finding either that "the accident resulted from some cause other than the defendant's negligence or that he exercised due care in all possible respects wherein he might have been negligent," then the jury must find the defendant negligent.[62] Second, where the basic facts giving rise to the presumption are established as a matter of law and the defendant introduces evidence sufficient to support a finding "either of his due care or of a cause for the accident other than his negligence, the presumptive effect of the doctrine vanishes."[63] In unusual cases the defendant's evidence may be so conclusive as to dispel the inference of negligence as a matter of law,[64] but, except in such a case, the jury may still be able to infer negligence from the facts which give rise to the presumption.[65]

> "Whether the jury should draw the inference will depend on whether the jury believes that the probative force of the circumstantial and other evidence of the defendant's negligence exceeds the probative force of the contrary evidence and, therefore, that it is more likely than not that the defendant was negligent."[66]

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61 See CLRC, supra note 44, 1-7

62 Id., at 6.

63 Id.

64 See Leonard v. Watsonville Community Hosp., 47 Cal.2d 509, 305 P.2d 36 (1956).

65 See Evidence Code Section 604

66 See CLRC, supra note 44, at 4.

If the evidence is balanced, the jury must find for the defendant, since the plaintiff retains the burden of proof.[67] Third, where the defendant attacks only the conditions of the doctrine, the court must give a conditional res ipsa loquitur, since it is for the jury to determine the existence of facts justifying the application of the res ipsa loquitur.[68] Thus, the jury must find the defendant negligent if it finds the basic facts have been established by a preponderance of the evidence.[69] Fourth, if the defendant attacks the elements of the doctrine as well as produces evidence to support a finding either of his due care or of a cause of the accident other than his negligence, the presumptive effect of the doctrine disappears, and the "greatest effect the doctrine can have in the case is to support an inference that the accident resulted from the defendant's negligence."[70] Thus, if the jury believes the basic facts have been established by a preponderence of the evidence, then it may infer from those facts that the accident was more likely than not caused by the defendant's negligence.

IV. ANALYSIS OF SENATE BILL 351:

A. SUMMARY OF ARGUMENT

1. This bill will exclude as irrelevant in malpractice suits all evidence on rarity of accidents when used to determine

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67 See Prosser, supra note 3, at 194

68 Seneris v. Haas, 45 Cal.2d 811, 827, 291 P.2d 915 (1955); Edelman v. Ziegler, 233 Cal.App.2d 871, 880, 44 Cal.Rptr. 114 (1965)

69 See CLRC, supra note 44, at 7.

70 Id.

whether it was more probable than not that a negligent act caused the accident; and,

2. This bill is directed specifically at overruling the doctrine of Quintal v. Laural Grove Hosp., supra, and Clark v. Gibbons, supra.

B. LINES 3-5:

> "The application of the doctrine known as 'res ipsa loquitur' only creates a rebuttable presumption which affects the burden of producing evidence."

These lines are consistent with California Evidence Code Section 604 on the effect of rebuttable presumptions and with the tentative res ipsa loquitur provision of the CLRC.

C. LINES 5-7:

> "Res ipsa loquitur shall be applied only to those accidental injuries which more probably than not constitute circumstantial evidence of negligence."

This sentence apparently restates a foundational finding required for invoking res ipsa loquitur. However, the insertion of the word, "only", in line 6 emphasizes the proposed modifications of existing law intended by the author of this bill. These are treated in the next subsections.

D. LINES 8-10:

> "Where there is a calculated risk of accidental injury, the rarity of accidents shall not constitute a ground or reason for application of res ipsa loquitur."

Here the author intends to eliminate the relevance of rarity in malpractice suits. He conditions the elimination of rarity on the presence of a "calculated risk of accidental injury;"

therefore, it is important to analyze those concepts.

Risk in medical treatment depends on a number of factors:

(a) the nature of the procedure;

(b) the skill of the operator;

(c) the care used by the operator, both in selecting the right procedures and in carrying them out properly;

(d) the presence of undiscoverable idiosyncrasies of the patient which adversely affect the procedure, and;

(e) causes the nature of which are currently unknown.

If a risk is calculated statistically, for example, that in five (5%) per cent of the cases where a certain procedure is performed there is an "accidental injury", then what significance does this statistic have for deciding whether or not the accident was caused by negligence? The statistic may mean no more than that in five (5%) per cent of the cases no negligent cause was officially assigned, but that does not rule out the possibility of assigning a negligent cause in that five (5%) per cent in the light of modern medical knowledge or of frank disclosure. Acts covered in factors (b) and (c) above could have been the cause of injury. On the other hand, it might be that no explanation is available in light of current knowledge. It follows that a doctor testifying in the role of a medical expert about a "calculated risk" of X% cannot imbue the faulty information with a precision it lacks; his assurance that this X% occurs despite due care is merely ipse dixit.

Lacking criteria for evaluating whether a negligent cause should be assigned to any of the unsuccessful X% and considering that almost every type of operation has some failures, we conclude that every type of operation has, in the sense of the proposed bill, some "calculated risk". Therefore, this statute will apply to all medical treatments, regardless of whether the degree of risk is high or low.

It is also important to note that the phrase, ""rarity... shall not constitute a ground or reason...," in line 9 implies that the fact that an accident is rare will always be irrelevant in establishing the foundational requirement for res ipsa loquitur. This is not a mere restatement of the Siverson v. Weber doctrine, that rarity alone is not sufficient to infer negligence, since this new formulation would prevent rarity from being "a reason" as well as from being "the reason".

E. LINES 10-14:

> "in cases of rare accident or injury, associated with a calculated risk of occurrence, and with the addition of specific proof of negligence, res ipsa loquitur shall not be applied..."

Unlike the previous sections which sought to insure that rarity of accident was never considered, the force of these lines is specifically directed to one type of case: namely, where the plaintiff has evidence of negligent acts of a type which could possible have caused the injury. In other words, the author is attempting to overrule the Quintal v. Laural Grove Hosp., supra

and Clark v. Gibbons, supra, doctrine. But the presence of specific proof of independent acts of negligence has not traditionally prevented application of res ipsa loquitur:

> "...it is quite generally agreed that the introduction of some evidence which tends to show specific acts of negligence on the part of the defendant, but which does not purport to furnish a full and complete explanation of the occurrence does not destroy the inferences which are consistent with the evidence, and so does not deprive the plaintiff of the benefit of res ipsa loquitur."[71]

It is important to note that this provision would create an arbitrary distinction between cases which equally fall within the traditional policy scope of res ipsa loquitur. The plaintiff who has evidence merely of some independent negligent acts accompanying the operation is only a little better off than a plaintiff who has no evidence. The independent negligent acts could possibly have caused the injury, but their connection is usually remote. At the same time, the defendant doctor has within his control knowledge of what happened in other, more critical areas of the operation. It would be highly anomalous if a plaintiff who could show some degree of neglect by the physician even though lacking important information should be thrown out of court while a plaintiff who lacks all information should get the benefit of res ipsa loquitur. The policy of forcing the doctor to disgorge information uniquely in his control is critical to an accurate adjudication, and that policy applies to both types of cases.[72]

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71 Prosser, Torts 3rd Ed., (1964), p. 236

72 77 Harv. L. R. 333 (1963)

V. CONSIDERATION OF POLICY

Having gained an understanding of the effect of S.B. 351 on the current status of the law, we must now face the practical consequences of either alternative. We are a political body and we must recognize that the decision we must make is essentially a political one. The legislature must therefore explicitly address itself to the ramifications of risk-allocation in the field of Medical malpractice.

The Court has expanded the doctrine of res ipsa loquitur to fulfill a specific need. Except in the most obvious case of blatant negligence, patient-plaintiffs have found it virtually impossible to hold doctors accountable for their mistakes.

Medical expert testimony, by process of evolution, is the essential link in the chain between plaintiff's injury and his recovery.

The practical proof problems confronting plaintiffs in medical-malpractice cases are so severe that courts, traditionally neutral to the pragmatics of lawsuits in general, have explicitly recognized plaintiff's dilemma and adjusted res ipsa loquitur accordingly.

There is no question that the doctrine as presently constituted is not perfect. It is conceivable that there may be an occasional unwarranted recovery. However, one must recall that the present form of the doctrine is a response to an era when most negligent acts of physicians went uncompensated; and from a utilitarian point of view the present law results in the most good and

least wrongs for most people. Further, with regard to the injustices inherent in either system it must be pointed out that physicians, because of the availability of malpractice insurance, are in a considerably better position to insulate themselves against these evils, than are individual patient-plaintiffs.

Much has been made about the retardive effects the new res ipsa loquitur might have on the use of experimental techniques. However, we have not seen a single case where the experimental nature of a procedure was a factor, even tangentially, absent, of course, a failure to make adequate disclosure of the experimental nature of the procedure. This "so-called concern" seems to be a fabrication of a few worried minds, manifesting in reality, the results of a vested interest.

Finally, one might quibble about the techniques used by the courts in permitting its increased recoveries. Res ipsa loquitur has been convoluted in order to facilitate recovery in what the court deems appropriate cases. And although res ipsa loquitur was a judicially-created doctrine formulated to fill a legislative void, some have expressed concern over the court's expansion of its own doctrine. Others express the more basic objection that courts should not be "legislating" in this area at all. Finally, some have labelled the use of the doctrine of res ipsa loquitur to permit increased recoveries as "a subterfuge", preferring instead that the courts address themselves directly to the economic and political aspects of the problem, as they did in the area of products liability. (Cf. Greenman v. Yuba Power Products, Inc., 59 C.2d 57, 27 Cal.Rptr. 697, 337 P.2d 897 (1963)

Although all of these objections contain some modicum of truth, it should be understood that these are secondary complaints raised to obscure the primary economic and political issue, i.e., who is going to pay when doctors 'screw up'. To the extent that one makes the political decision, based on the considerations discussed previously, that doctors, rather than patients, should bear this burden, all this puristic and legalistic camouflage must become irrelevant. It may well be preferable for the legislature to formulate an integrated system of recovery, obviating the deficiencies inherent in the present system. However, no such plan is now before the legislature, and there is no indication that such a plan is forthcoming. Our decision must be between two alternatives. As the existing one clearly appears to be the better of the two, to discard it on the basis of policy considerations would be wrong; to discard it on the basis of nit-picking legalistic conceptualisms would be tantamount to burning the house down to get rid of the mice.

206—206-F.

RES IPSA LOQUITUR

Note: As Dean Prosser says: "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." (Prosser on Torts, 3d Ed. § 40, p. 232).

The opinion in Burr v. Sherwin Williams Co., 42 Cal.2d 682, 268 P.2d 1041, makes it clear that prior to the adoption of the Evidence Code the inference of negligence in a res ipsa loquitur case is mandatory, a special kind of inference which must be rebutted although its effect is somewhat akin to that of a presumption.

It thus appears to the Committee that under the Evidence Code the doctrine of res ipsa loquitur functions the same as a presumption affecting the burden of producing evidence under section 604. The revisions to the res ipsa loquitur instructions have been made on the assumption that it will be so classified either by judicial decision or by amendment to the Evidence Code.

The Tentative Recommendation of the Law Revision Commission, under date of January 1, 1966, recommends the addition of section 646 to the Evidence Code, which, if adopted, would read as follows:

"The judicial doctrine of res ipsa loquitur is a presumption affecting the burden of producing evidence. If the facts that give rise to the presumption are found or otherwise established in the action and the party against whom the presumption operates introduces evidence which would support a finding that he was not negligent, the court may, and on request shall, instruct the jury as to any inference that it may draw from the facts so formed or established."

The provision in the proposed new section that "the court may, and upon request shall, instruct the jury as to any inference that it may draw from the facts so found or established" is entirely compatible with the last sentence of section 604 that "Nothing in this section shall be construed to prevent the drawing of any inference."

The revised instructions on res ipsa loquitur which follow relate: first, to the circumstances which justify its application (Instructions 206-A (Revised) and 206-B (Revised)), and, second to its effect (Instructions 206 (1967 Revision) and 206.1 (New)).

The introductory Instruction 206-A (Revised) (or 206-B (Revised) if the fact that an accident occurred is in issue) should be given in every case except in the rare situation when the conditions given rise to the doctrine exist as a matter of law.

If there is any evidence which would support a finding that there was no negligence, next give Instruction 206 (1967 Revision).

If there is no evidence sufficient to support a finding that there was no negligence, Instruction 206.1 (New) may be given instead of Instruction 206 (1967 Revision).

In malpractice cases give Instruction 214-W (New) instead of Instruction 206-A (Revised) and Instruction 214-X (New) instead of Instruction 206-B (Revised).

In the Pocket Part we are placing the res ipsa loquitur instructions in the order in which they are given although out of numerical sequence.

The defendant's superior knowledge is not a prerequisite for the application of the doctrine of res ipsa loquitur. Seffert v. Los Angeles Transit Lines, 56 Cal.2d 498, 15 Cal.

Rptr. 161, 364 P.2d 337. Evidence of specific acts of negligence will not deprive plaintiff of the benefit of the res ipsa loquitur doctrine unless the evidence shows the cause of the accident and the care exercised by defendant as a matter of law, eliminating any justification for resort to an inference. Di Mare v. Cresci, 58 Cal.2d 292, 23 Cal.Rptr. 772, 373 P.2d 860; Shahinian v. McCormick, 59 Cal.2d 554, 30 Cal.Rptr. 521, 381 P.2d 377; Furtado v. Montebello Unified School District, 206 Cal.App.2d 72, 23 Cal.Rptr. 476.

Error may result if the jury is instructed that the mere fact that an accident happened does not support an inference of negligence when res ipsa loquitur applies. Barrera v. De La Torre, 48 Cal.2d 166, 308 P.2d 724; Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 323 P.2d 391; Phillips v. Noble, 50 Cal.2d 163, 323 P.2d 385. The Committee has now disapproved the use of the "mere fact" instruction in all cases. See Note to Instruction 131, herein.

206. (1967 Revision)

Res Ipsa Loquitur: Where Only a Permissible Inference of Negligence

Use Note: This instruction is to be given where the court has determined that there has been sufficient evidence to support a finding that defendant was not negligent, which results under Evid.Code, § 604 in the disappearance of the presumption of negligence from the establishment of the conditional facts. However, the court may ("and on request shall" under proposed Section 646) instruct the jury that they may draw an inference of negligence from the establishment of the conditional facts.

This instruction must be preceded by Instruction 206–A (Revised) or 206–B (Revised), as the case may be, unless it has been established by uncontradicted evidence or admission that facts exist which give rise to the res ipsa loquitur doctrine.

In malpractice cases where there is a question whether facts exist which give rise to the res ipsa loquitur doctrine, this instruction must be preceded by Instruction 214–W (New) or 214–X (New), as the case may be.

Comment: As noted in the Note to the series of instructions, the doctrine of res ipsa loquitur has been treated in the revised instructions as a presumption affecting the burden of producing evidence (Evid.Code, § 604). As so treated, the presumption of negligence vanishes where there is sufficient evidence to sustain a finding of the nonexistence of defendant's negligence. However, an inference of negligence may still be drawn from the establishment of the conditional facts upon which the doctrine is based.

The final paragraph of this instruction as to the sufficiency of the evidence to meet or balance the inference of negligence, if drawn by the jury, is based on established authorities such as Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12 and Roddiscraft, Inc. v. Skelton Logging Co., 212 Cal.App.2d 784, 28 Cal.Rptr. 277.

In cases where there are several defendants this instruction should be modified so as to apply only to those defendants who are identified as having had control of the instrumentality involved. "It is well settled that the exclusive control required by the doctrine of res ipsa loquitur is not the exclusive control of any one defendant. . . . [W]here all of the parties who exercised control over the instrumentality which caused the injury are sued together, the doctrine may be used, and the defendants called upon to explain how the injury came about." Poulsen v. Charlton, 224 Cal.App.2d 262, 268, 36 Cal. Rptr. 347, 350. In medical malpractice cases, where there are multiple defendants, see Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258.

From the happening of the accident involved in this case, an inference may be drawn that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

If you draw such inference of defendant's negligence then, unless there is contrary evidence sufficient to meet or balance it, you will find in accordance with the inference.

In order to meet or balance such an inference of negligence, the evidence must show either (1) a definite cause for the accident not attributable to any negligence

of defendant, or (2) such care by defendant that leads you to conclude that the accident did not happen because of defendant's lack of care but was due to some other cause, although the exact cause may be unknown. If there is such sufficient contrary evidence you shall not find merely from the happening of the accident that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

Negligence ⇐138(2).

206–A. (Revised)

Introduction to 205: Conditions to be Met Before the Doctrine may be Applied

Use Note: If there is sufficient evidence to sustain a finding that there was no negligent conduct, this instruction should be followed by Instruction 206 (1967 (Revision).

If there is *not* sufficient evidence to sustain a finding that there was no negligent conduct, this instruction should be followed by Instruction 206.1 (1967 New).

When there is a question whether in fact the accident happened, give Instruction 206–B (Revised) instead of this instruction.

Comment: The Evidence Code does not require any revision of this instruction, which must be given when there is a question whether the facts exist which give rise to the res ipsa loquitur doctrine.

Whenever the evidence can be said to be conflicting or subject to different inferences, it is a question of fact whether the conditions exist necessary to bring into effect the doctrine of res ipsa loquitur. This question must be submitted to the jury under proper instructions. Keena v. Scales, 61 Cal.2d 779, 40 Cal.Rptr. 65, 394 P.2d 809; Tucker v. Lombardo, 47 Cal.2d 457, 303 P.2d 1041; Kite v. Coastal Oil Co., 162 Cal.App.2d 336, 328 P.2d 45; Tallerico v. Labor Temple Ass'n, 181 Cal. App.2d 15, 4 Cal.Rptr. 880.

In malpractice cases use Instruction 214–W (New) rather than this form. See Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, 53 A.L.R.2d 124; Salgo v. Leland Stanford, Jr., University Bd. of Trustees, 154 Cal.App.2d 560, 317 P.2d 170.

For an exhaustive analysis of the three conditions essential to give rise to the res ipsa loquitur doctrine, see Roddiscraft, Inc. v. Skelton Logging Co., 212 Cal.App.2d 784, 28 Cal.Rptr. 277.

This instruction and 206 must be modified if more than one defendant is involved.

This form is adapted to a situation where the jury must determine whether all of the conditions for res ipsa loquitur are present. If one or two of these conditions exist as a matter of law they should be omitted from the instruction.

Include bracketed portion in third paragraph when there is evidence that the instrumentality which caused the injury was out of defendant's control for a time prior to the accident, and during that time was under the control of other persons. See Burr v. Sherwin-Williams Co., 42 Cal.2d 682, 268 P.2d 1041; Trust v. Arden Farms Co., 50 Cal.2d 217, 324 P.2d 583, 81 A.L.R.2d 332; Tallerico v. Labor Temple Ass'n, 181 Cal.App.2d 15, 4 Cal.Rptr. 880.

As to the meaning of exclusive control, see Owens v. White Memorial Hospital, 138 Cal.App.2d 634, 640, 292 P.2d 288, 292; Poulsen v. Charlton, 224 Cal.App.2d 262, 36 Cal.Rptr. 347.

As to what constitutes action or contribution by plaintiff which precludes his reliance on the doctrine, see Guerrero v. Westgate Lumber Co., 164 Cal.App.2d 612, 331 P.2d 107. This must not be confused with contributory negligence. Shahinian v. McCormick, 59 Cal.2d 554, 30 Cal.Rptr. 521, 381 P.2d 377; Gillespie v. Chevy Chase Golf Club, 187 Cal.App.2d 52, 9 Cal.Rptr. 437; Dunn v. Vogel Chevrolet, 168 Cal.App.2d 117, 335 P.2d 492.

One of the questions for you to decide in this case is whether the accident [injury] involved occurred under the following conditions:

First, that it is the kind of accident [injury] which ordinarily does not occur in the absence of someone's negligence;

Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after defendant relinquished control]; and

Third, that the accident [injury] was not due to any voluntary action or contribution on the part of the plaintiff.

If, and only in the event that you should find all these conditions to exist, you are instructed as follows:

Negligence ⇐138(2).

206–B. (Revised)

Introduction to 206: When Accident and/or Injury Denied

Note: This instruction should precede No. 206 (1967 Revision) or No. 206.1 (New) when there is a question whether the alleged accident occurred (e. g., Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 260 P.2d 63; McMillen v. Southern Pacific Co., 146 Cal.App.2d 216, 303 P.2d 788), or, if the accident occurred, whether plaintiff was injured thereby.

Plaintiff claims there was an accidental occurrence; defendant denies it. If, and only in the event you should find that as claimed by plaintiff, there was an accidental occurrence [and plaintiff was injured thereby], then [you are instructed as follows:] * it will be your further duty to determine whether the accident [injury] involved occurred under the following conditions:

First, that it is the kind of accident [injury] which ordinarily does not occur in the absence of someone's negligence;

Second, that it was caused by an agency or instrumentality in the exclusive control of the defendant [originally, and which was not mishandled or otherwise changed after defendant relinquished control]; and

Third, that the accident [injury] was not due to any voluntary action or contribution on the part of the plaintiff.

If, and only in the event that you should find all these conditions to exist, you are instructed as follows:

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* If the three classic conditions for application of the res ipsa loquitur doctrine are established as a matter of law, the court should omit the balance of this instruction and proceed to give 206 (1967 Revision) at this point.

Negligence ⇨*138(2).*

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*206.1. (New)

Res Ipsa Loquitur: Where a Presumption of Negligence

Use Note: This form is to be used alone only where it is established either by uncontradicted evidence or admission that the facts exist which give rise to the res ipsa loquitur doctrine and where there is no evidence sufficient to sustain a finding of the nonexistence of defendant's negligence.

Where the existence of the facts which give rise to the res ipsa loquitur is in issue but there is no evidence sufficient to sustain a finding of the nonexistence of defendant's negligence, this instruction must be preceded by 206–A (Revised), or 206–B (Revised), or both, depending on the facts in dispute.

Do *not* give this instruction if there is sufficient evidence to support a finding that the defendant was not negligent. In such case, give Instruction 206 (1967 Revision).

You will find from the happening of the accident involved in this case that a proximate cause of the occurrence was some negligent conduct on the part of the defendant.

Negligence ⇐138(2).

Welch v. Sears, Roebuck & Co., 96 Cal.App.2d 553, 215 P.2d 796.

Seedborg v. Lakewood Gardens Ass'n, 105 Cal.App.2d 449, 233 P.2d 942.

In making such a showing, it is not necessary for a defendant to overcome the inference by *a preponderance of the evidence.* Plaintiff's burden of proving negligence by a preponderance of the evidence is not changed by the rule just mentioned. It follows, therefore, that in order to hold the defendant liable, the inference of negligence, either alone or such other evidence, if any, as favors it, must have greater weight, more convincing force in the mind of the jury, than the opposing explanation offered by the defendant and any evidence supporting it.

If such a preponderance in plaintiff's favor exists, then you must find that some negligent conduct on the part of defendant was a proximate cause of the injury; but if the evidence preponderates in defendant's favor, or if in the jury's mind an even balance exists as between the weight of the inference and such evidence as favors it, on the one side, and the weight of the contrary explanation and such evidence as favors it, on the other side, neither having the more convincing force, then the verdict must be for the defendant.

Automobiles ⇐*246(60).*
Carriers ⇐*321(21).*
Negligence ⇐*138(2).*
Railroads ⇐*351(3), 401(1).*
Street railroads ⇐*118(1).*
Other specific topics.