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Defense Against *Res Ipsa* in Medical Malpractice

Howard M. Rossen*

IN A *res ipsa loquitur* case the injured party is deemed in no position to explain the cause, while the party charged may be in a position to show himself free from negligence. If the plaintiff has equal or superior means of information, the doctrine does not apply.¹

The question is really one of duty on the part of the defendant. *Res ipsa loquitur* leads only to a possible (not mandatory) inference that the defendant has not complied with his duty to use skill and care, and is not in itself proof that he was under a specific duty. This question of duty often arises in cases of medical malpractice.² A physician or surgeon normally undertakes to exercise the skill and care common to the medical profession. A mistaken diagnosis, or an accident which happens in spite of all reasonable precautions ordinarily are not enough to show the necessary lack of skill and care.³ Laymen usually are not qualified to say that a good doctor would not go wrong. Expert testimony is indispensable before negligence can be found, except in a few unusual cases.⁴

The doctrine may not be invoked merely because a patient is not cured or because aggravation follows treatment. Common experience teaches that cure is never certain and aggravation is possible even though proper care is used. A doctor is neither a

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¹ 2 Encyc. of Negligence § 478 (1962); Annot., 53 A. L. R. 1494 (1928); Note, 19 N. C. L. R. 617 (1941).

² Note, 3 So. Cal. L. R. 131 (1929); Note, 40 Col. L. R. 161 (1940). The duty standard is not that of the ordinary person. *Barbire v. Wry*, 75 N. J. Super. 327, 183 A. 2d 142 (1962).

³ *Carroway v. Graham*, 218 Ala. 453, 118 So. 807 (1928); *Loudon v. Scott*, 58 Mont. 645, 194 P. 488 (1920); *Boyce v. Brown*, 51 Ariz. 416, 77 P. 2d 455 (1938); *Meador v. Arnold*, 264 Ky. 378, 94 S. W. 2d 626 (1936).

⁴ *Skeffington v. Bradley*, 115 N. W. 2d 303 (Mich. 1962); Anno. 141 A. L. R. 5; *Callahan v. Hahnemann Hospital*, 1 Cal. 2d 477, 35 P. 2d 536 (1934); *April v. Peront*, 88 N. H. 309, 188 A. 457 (1936); *Nelson v. Murphy*, 42 Wash. 2d 737, 258 P. 2d 472 (1953); See also Prosser, *Law of Torts* § 43, p. 210 (2nd ed., 1955). But see (lay testimony accepted), *Michaels v. Spiers*, 144 S. 2d 835 (Fla. 1962). And see n. 12.

warrantor of cures nor an insurer.⁵ Where reasonable doubt exists as to the proper treatment to pursue, an inference of negligence is not ordinarily raised from honest mistakes or errors in judgment.⁶ A physician or surgeon is held to the requisite degree of learning, skill and ability necessary to the practice of his profession, and which others similarly situated possess, and must apply those facilities with ordinary care and diligence in every case.⁷

The basis for rejection of the doctrine of *res ipsa loquitur* can best be illustrated by examining various court decisions.

In *Quinley v. Cocke*⁸ plaintiff alleged negligence on the part of his physician, having received a fractured hip during an electric shock treatment. The plaintiff sought to apply the doctrine. It appeared from plaintiff's own testimony that he knew that the purpose of the electric shock was to throw him into a convulsion. Plaintiff had been told about these treatments and knew that they were very strenuous. In denying recovery the court stated that the doctrine will not apply in malpractice cases where a scientific exposition of the subject matter is essential. Plaintiff failed to introduce evidence showing a lack of skill in administering the shock treatment or that he was given an excessive shock of electricity. There was no evidence to show that the treatment given differed in any way from that which is usual and customary by a skillful practitioner. In a situation of this kind there is manifest need of a scientific exposition of the subject matter in order for the court and jury to clearly understand the nature of the treatment as well as the usual results that follow. The court said that if it applied the doctrine in cases of this kind, the physician or surgeon would always be in fear of the result of scientific treatment, knowing that he might have to defend his professional reputation in open court.

If the maxim, *res ipsa loquitur* were applicable . . . and a failure to cure were held to be evidence, however slight, of

⁵ *Pendergraft v. Royster*, 203 N. C. 384, 166 S. E. 285 (1932); *Davis v. Pittner*, 212 N. C. 680, 194 S. E. 97 (1937). Also, fright by medically warranted advice is not actionable. *Kraus v. Spielberg*, 37 Misc. (N. Y.) 2d 519 (Supr. Ct., Kings Co. 1962).

⁶ *Brewer v. Ring*, 177 N. C. 476, 99 S. E. 358 (1919).

⁷ *Mullinax v. Hord*, 174 N. C. 607, 94 S. E. 426 (1917); *Nash v. Royster*, 189 N. C. 408, 127 S. E. 356 (1925).

⁸ 183 Tenn. 428, 192 S. W. 2d 992 (1946). As to what is proper warning of dangers involved, see, *Williams v. Menchen*, 370 P. 2d 292 (Kans. 1963); *Govin v. Hunter*, 374 P. 2d 421 (Wyo. 1962).

negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the ills that flesh is heir to.⁹

In a Pennsylvania case, where the plaintiff was struck on the knee by a spark from a machine while having her teeth x-rayed, the doctrine was rejected. The court held that, because the medical profession must occasionally employ dangerous agencies, to attach a presumption of negligence to their use would make the doctor an insurer of his patient.¹⁰

Courts have also rejected the doctrine in cases involving diagnosis. In an Ohio decision, plaintiff sued the defendant physician, who limited his practice to radiology, for injuries allegedly resulting from defendant's malpractice. Plaintiff alleged that the defendant was negligent in subjecting her to x-ray therapy when he knew or should have known that her physical condition did not require said therapy; and that said treatment was highly dangerous and likely to result in severe injury to the skin and tissues of plaintiff's body. The court stated that the doctrine is seldom applicable in cases involving diagnosis and scientific treatment.¹¹ Furthermore, the doctrine cannot be invoked in aid of specific charges of negligence, and is inapplicable where the complaint alleged and plaintiff affirmatively showed how her injuries were inflicted.

In a recent Texas decision, plaintiff brought an action for alleged failure to properly diagnose her condition after an operation. Plaintiff was unconscious when injury occurred to a part of the body upon which no surgery was being performed. Plaintiff's contention failed because there was no probative evidence that the pinpoint hole in the ureter appeared at the time she was under anesthesia or that defendant caused it by the use of clamps or other surgical tools. The court stated that the law entertains,

⁹ Ewing et al. v. Goode, 78 Fed. 442, 443 (C. C. S. D. Ohio 1897); Note, 26 Notre Dame Law. 756 (1951).

¹⁰ Nixon et ux. v. Pfahler, 279 Pa. 377, 124 A. 130 (1924); Accord: Malila v. Meacham, 187 Ore. 330, 211 P. 2d 747 (1949) where the court stated at page 757: "A physician or dentist is not a warrantor of cures, and the doctrine of *res ipsa loquitur* does not apply in malpractice cases." See also Johnson v. Colp, 211 Minn. 245, 300 N. W. 791 (1941) where the court held that in a malpractice action by a patient against a physician, failure on the part of the physician by treatment and operation to effect a cure was not grounds for applying *res ipsa loquitur*, since such failure occurs under the most skillful and careful treatment.

¹¹ Sieling v. Mahrer, 71 Ohio L. Abs. 571, 113 N. E. 2d 373 (Ohio App. 1953). No duty to diagnose rare medical difficulties accurately. Willard v. Hutson, 378 P. 2d 565 (Ore. 1963).

in favor of a physician, the presumption that he has discharged his full duty. To defeat this presumption the law exacts affirmative proof of breach of duty coupled with affirmative proof that such breach resulted in injury. To warrant the finding of civil malpractice there must be expert medical testimony to establish it.¹²

In a 1962 California case,¹³ defendant, a specialist in gynecology, assisted by a general surgeon, performed a hysterectomy on the plaintiff. After the operation, plaintiff was found to have a vesicovaginal fistula.¹⁴ Plaintiff instituted action, but did not call expert witnesses. As her basis for invoking *res ipsa loquitur*, plaintiff relied on defendant's answer that usually when a gynecologist exercised that degree of skill and care ordinarily exercised by reputable gynecologists, a fistula does not follow a hysterectomy, and that a fistula is an uncommon complication. The court held that to permit an inference of negligence under the doctrine of *res ipsa loquitur* solely because an uncommon complication develops would place too great a burden upon the medical profession and might result in an undesirable limitation on the use of procedures involving an inherent risk of injury even when due care is used. When risks are inherent in an operation and a rare injury does occur, the doctrine should not be applied unless it can be said, that in the light of past experience, such an occurrence is more likely the result of negligence than of some cause for which the defendant is not responsible.¹⁵

When a physician or surgeon is accused of negligence, the law logically should require that the charge be supported by some opinion evidence to a reasonable degree of certainty, advanced by a properly qualified medical expert.¹⁶

The doctrine is inapplicable in malpractice actions when it is invoked solely on the ground that the treatment was unsuccessful.

¹² *Shockley v. Payne*, 348 S. W. 2d 775 (Tex. Civ. App., 1961); *Evans v. Sarrall*, 25 Cal. Rptr. 424 (1962); *Barker v. Heaney et al.*, 82 S. W. 2d 417 (Tex. Civ. App., 1935); *Bowles et al. v. Bourdon et al.*, 147 Tex. 608, 219 S. W. 2d 779 (1949); *Floyd v. Michie*, 11 S. W. 2d 657 (Tex. Civ. App. 1928). And see n. 4.

¹³ *Siverson v. Weber*, 22 Cal. Reprtr. 337, 372 P. 2d 97 (1962).

¹⁴ An opening through the wall of the bladder and vagina.

¹⁵ *Siverson v. Weber*, *supra*, note 13. See also, *Dietze v. King*, 184 F. Supp. 944 (D. C. E. D. Va. 1960).

¹⁶ See *Quick v. Thurston*, 290 F. 2d 360 (D. C. Cir. 1961); *Jensen v. Linner*, 260 Minn. 22, 108 N. W. 2d 705 (1961); *Eckleberry v. Kaiser Foundation Northern Hospitals*, 226 Ore. 616, 359 P. 2d 1090 (1961); *Marsh v. Pemberton*, 10 Utah 2d 40, 347 P. 2d 1108 (1959); See also 11 *Defense Law Journal* 499 (1962).

ful or terminated with poor or unfortunate results. This is in accord with the universally recognized propositions that the mere fact of a poor or unsuccessful result does not in itself constitute evidence of negligence, does not establish a *prima facie* case, and does not shift to the defendant the necessity of carrying the burden of proof or going forward with the evidence.¹⁷

The necessity of producing expert testimony in an action based on application of the doctrine is shown in a recent Utah case¹⁸ involving a blood transfusion which caused death to plaintiff's wife. The plaintiff sued on the theory of *res ipsa loquitur*. The court referred to an early case in which the doctrine first appeared.¹⁹ In considering the rules set forth in this prior case, the Supreme Court of Utah discussed blood transfusions at length but found no evidence of negligence. Judgment for the defendant was affirmed.²⁰ The expert testimony revealed that even when the best methods known to medical science are used in the typing and matching of blood, hemolytic reactions²¹ occur in one to five per thousand transfusions and that death may result in from 25 to 30 per cent of those suffering this reaction.²²

The danger inherent in applying the doctrine to doubtful cases has been graphically illustrated in cases in the area of x-rays. Earlier cases treated an x-ray burn as *prima facie* evidence

¹⁷ *Silverson v. Weber*, 22 Cal. Rptr. 337, 372 P. 2d 97 (1962); Annot., 162 A. L. R. 1265 (1946).

¹⁸ *Joseph v. Groves Latter-Day Saints Hospital*, 10 Utah 2d 94, 348 P. 2d 935 (1960).

¹⁹ *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Reports 299 (1863). Plaintiff, walking in a public street, was injured when a barrel of flour fell upon him from the window above the defendant's shop. The court allowed recovery and stated that the fact of its falling is *prima facie* evidence of negligence and plaintiff is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence, it is for the defendant to prove them.

²⁰ The court stated that the giving of blood transfusions has become a well recognized means of medical therapy. Techniques employed in connection with giving them are standardized. The hazard of an adverse reaction is well known and *res ipsa loquitur* has been applied in some cases when the evidence will sustain a finding that the wrong type of blood is actually given.

²¹ Destruction of the red blood cells.

²² *Ibid.*; See also *Merker v. Wood*, 307 Ky. 331, 210 S. W. 2d 946 (1948), where the court stated that the doctrine does not apply in malpractice cases and plaintiff must prove negligence by expert testimony and must prove that such negligence was the proximate cause of injury unless the subject matter is within common knowledge of laymen in which case the testimony of experts is not required. And see, *Becker v. Eisenstadt*, 60 N. J. S. 240, 158 A. 2d 706 (1960).

of negligence of the operator.²³ As scientific knowledge of the x-ray has progressed, it has been demonstrated that it is quite as likely that the personal idiosyncrasy of the patient was the proximate cause of the injury. A strong trend of authority is clearly away from treating these as *res ipsa loquitur* cases.²⁴

The element of control as a requirement for recovery under the doctrine of *res ipsa loquitur* has been considered by many courts. In the case of *Morgensen v. Hicks*²⁵ plaintiff brought an action against a physician, a pharmaceutical manufacturer, a hospital and others for injuries sustained following the injection of an anesthetic. One of the counts in plaintiff's petition was based on *res ipsa loquitur*. The court treated the doctrine in a lengthy analysis and set forth its component parts.²⁶ In this case, the doctor was not in full control of the instrumentalities involved. He controlled the surgical instruments and the medicine, but not the condition and reactions of his patient. Allergic reaction of the plaintiff was an element beyond the control of defendant. A doctor is in constant contact with the frailties, idiosyncrasies, physical and mental weaknesses, and allergies of human nature. They may affect the condition, and yet are beyond his control.²⁷ Recovery was denied.²⁸

In *Blackman v. Zeligs*,²⁹ plaintiff charged the defendant with negligence in the course of an operation to set her hipbone. Plaintiff sustained burns on her back from chemicals used in the operation, and sought to apply the doctrine. But here the defendant did not have exclusive control of the agency—the chemical—that allegedly caused the injury. The operation was performed

²³ *Shockley v. Tucker*, 127 Iowa 456, 103 N. W. 360 (1905); *George v. Shannon*, 92 Kan. 801, 142 Pac. 967 (1914); *Jones v. Tri-State Telephone and Telegraph Co.*, 118 Minn. 217, 136 N. W. 741 (1912); Annot., 57 A. L. R. 269 (1928).

²⁴ *Runyan v. Goodrum*, 147 Ark. 481, 228 S. W. 397 (1921); *Strett v. Hodgson*, 139 Md. 137, 115 A. 27 (1921).

²⁵ 110 N. W. 2d 563 (Iowa, 1961).

²⁶ *Id.* at page 565 the court describes the component parts as (1) The instrumentalities causing the injury must have been under the exclusive control of the defendants. (2) The happening of the injury must be such that in the ordinary course of events it would not occur without lack of due care on the part of the defendants.

²⁷ *Id.* at 566.

²⁸ The doctrine is rejected in the following cases: *Berg v. Willett*, 212 Iowa 1109, 232 N. W. 821 (1930); *Prewitt v. Higgins*, 231 Ky. 678, 22 S. W. 2d 115 (1929); *Hawkins v. McCain*, 239 N. C. 160, 79 S. E. 2d 493 (1954); *Groce v. Myers*, 224 N. C. 165, 29 S. E. 2d 553 (1944); *Whetstone v. Moravec*, 228 Iowa 352, 291 N. W. 425 (1940).

²⁹ 90 Ohio App. 304, 47 O. O. 393, 60 O. L. A. 568, 103 N. E. 2d 13 (1951).

in a hospital selected by the plaintiff. The hospital prepared the patient for the operation and furnished all the accessories, including the chemicals required in the operation, and its employees applied the chemicals. Under these circumstances the doctrine is not applicable because, even assuming that an inference could be drawn, such negligence could not be attributed to the defendant.³⁰

The element of control is considered in a 1961 Pennsylvania decision.³¹ Plaintiff brought an action of trespass to recover damages for personal injuries resulting from the puncturing of the esophagus in the course of a gastroscopic examination by the defendant physician. Plaintiff proved that injury resulted from the insertion of the gastroscope, but used no expert testimony in attempting to invoke the doctrine of *res ipsa loquitur*. An involuntary nonsuit was entered. The Supreme Court of Pennsylvania, in affirming, held that no presumption or inference of negligence arises merely because medical care or a surgical operation terminates in an unfortunate result which might have occurred even though proper care and skill had been exercised.³²

In *Gebhardt v. McQuillen*³³ the court, in refusing to apply the doctrine where plaintiff alleged injury due to careless and negligent treatment in setting fractured bones in their natural position, stated that the rule is seldom applied to cases of malpractice by physicians or surgeons. The physical condition of the patient, the nature of the injury—many things over which the physician has no control—may enter into the case and affect the result.³⁴

³⁰ See 42 Ohio Jur. 2d, Physicians and Surgeons, Sec. 151 at 669 (1960); 39 Ohio Jur. 2d, Negligence, Sec. 155 at 747 (1959).

³¹ *Demchuk v. Bralow*, 404 Pa. 100, 170 A. 2d 868 (1961); See also *Robinson v. Wirts*, 387 Pa. 291, 127 A. 2d 706 (1956); *Mack v. Reading Company*, 377 Pa. 135, 103 A. 2d 749 (1954); *Eckman v. Bethlehem Steel Company*, 387 Pa. 437, 128 A. 2d 70 (1956).

³² Other cases in accord: *Puffinbarger v. Day*, 24 Cal. Rptr. 533 (1962); *Dodson v. Pohle*, 73 Ariz. 186, 239 P. 2d 591 (1952); *Myer v. St. Paul-Mercury Indemnity Co.*, 225 La. 618, 61 So. 2d 901 (1952); *Vonault v. O'Rourke*, 97 Mont. 92, 33 P. 2d 535 (1934).

³³ 230 Iowa 181, 297 N. W. 301 (1941).

³⁴ A similar result was reached in the 1962 decision of *Lagerpusch v. Lindley*, 115 N. W. 2d 207 (Iowa, 1962). In his allegations of complaint for the wrongful death of his wife, plaintiff charged that defendants negligently failed to diagnose and treat decedent. The court rejected the doctrine and denied recovery. Neither the doctor nor the hospital was in full control of the instrumentalities involved. They could deal with the body of plaintiff's wife, but they had no control over her physical frailties, allergies, reactions, or idiosyncrasies.

An illustration of the control element in dentistry cases is set forth in an Illinois decision where a dentist was removing a decayed tooth and part of it went down the patient's throat.³⁵ The court rejected the theory. To say that the doctor had complete control of either the tooth or the mouthpack would be carrying the doctrine of *res ipsa loquitur* too far. A mishap such as the flying of a fragment of tooth or filling into a patient's throat while the tooth is being extracted is not of itself evidence of negligence or want of skill on the part of the doctor.³⁶

A distinctive class of cases involving injuries to unaffected areas of a patient's body are those resulting from the administration of anesthetics or other drugs. The fact that a patient dies while under the influence of an anesthetic will not alone invoke the doctrine of *res ipsa loquitur*.³⁷

In a Massachusetts case, it was held that the mere fact that a patient suffered an injury to her eyes by the administration of ether during an operation for a throat ailment does not alone warrant the inference of fault on the part of the surgeon in administering the ether.³⁸ Likewise, the doctrine was inapplicable where it was alleged that defendant, in undertaking to induce a condition of local anesthesia, used a quantity of liquid containing a high percentage of some caustic and deleterious chemical, causing a blister and resulting in an infection.³⁹

The mere fact that a needle or other instrument broke during use by a physician, surgeon, or dentist in treatment of a patient is insufficient to invoke the doctrine. This is especially true where defendant did not manufacture the needle or other instrument which broke, and there was nothing tending to indicate any defect.⁴⁰

In *Tady v. Warta*,⁴¹ it was held that the doctrine of *res ipsa loquitur* was inapplicable in an action against a physician for

³⁵ Bollenback v. Bloomenthal, 341 Ill. 539, 173 N. E. 670 (1930).

³⁶ See Hazard Hospital Co. v. Comb's Admr., 263 Ky. 252, 92 S. W. 2d 35 (1936). In this case a child's tooth was knocked out during an operation for a tonsillectomy. The tooth lodged in the child's lung, and the child died. In denying recovery, the court rejected the doctrine.

³⁷ Hasemeier v. Smith, 361 S. W. 2d 697 (Mo. 1962). Annot., 162 A. L. R. 1320 (1946). See, Wasmuth, Standards of Care in Anesthesiology, 7 Clev-Mar. L. R. 403 (1958).

³⁸ Klucken v. Levi, 293 Mass. 545, 200 N. E. 566 (1936).

³⁹ Lippard v. Johnson, 215 N. C. 384, 1 S. E. 2d 889 (1939); Gillen v. U. S., 281 F. 2d 425 (9th Cir. 1960).

⁴⁰ Annot., 162 A. L. R. 1321 (1946).

⁴¹ 111 Neb. 521, 196 N. W. 901 (1924).

alleged negligence in breaking off the point of a chisel while treating a bone infection and leaving the broken point imbedded in the bone. Breaking of the instrument might have been caused by a defect therein, by use of too much force, by negligence of defendant, or by a mere accident. The evidence pointed to no one of these possibilities in preference to the other.

Another rejection of the doctrine in dentistry is reported in an Indiana case.⁴² Plaintiff brought an action against the dentist for alleged negligence in breaking a hypodermic needle and allowing it to remain in plaintiff's jaw. The court said that *res ipsa loquitur* was not applicable in the absence of evidence that the needle was defective, not of a type commonly used by dentists, used in a careless or negligent manner, or not used according to the usual practice of skilled dentists. There was also a total lack of evidence by lay or expert witnesses that defendant was negligent in inserting the needle into the jaw of the plaintiff.⁴³ Likewise, in another dentistry case in Missouri where plaintiff brought an action against defendant for injuries sustained when a hypodermic needle broke off in plaintiff's gum, the doctrine was rejected. The court stated that to allow plaintiff to go to the jury on the theory of *res ipsa loquitur* under such evidence would allow the jury to determine the question of negligence upon pure speculation and conjecture.⁴⁴

In an Ohio decision the defendant doctor, in administering a spinal anesthetic, forced the needle into the bony structure of the plaintiff's spine and caused the needle to break. The court held that the breaking of the needle under the circumstances, coupled with its location outside of the channel of soft tissues and against the bone gave rise to a *prima facie* case of negligence, sufficient to call upon the defendant for explanation. In its opinion the court noted, however, that breaking of the needle, alone, did not permit application of *res ipsa loquitur*.⁴⁵

In a recent article⁴⁶ extension of the doctrine in medical malpractice cases by California courts was severely criticized. The

⁴² *Robinson v. Ferguson*, 107 Ind. App. 107, 22 N. E. 2d 901 (1939); See also *Smith v. McClung*, 201 N. C. 648, 161 S. E. 91 (1931); *Ernen v. Crofwell*, 272 Mass. 172, 172 N. E. 73 (1930).

⁴³ See Note, 26 Va. L. R. 919 (1940).

⁴⁴ *Mitchell v. Poole*, 229 Mo. App. 1, 68 S. W. 2d 833 (1934).

⁴⁵ *Wiley v. Wharton*, 68 Ohio App. 345, 41 N. E. 2d 255 (1941).

⁴⁶ Adamson, *Medical Malpractice: Misuse of Res Ipsa Loquitur*, 46 Minn. L. R. 1043 (1962).

function of the doctrine in California is to obviate the basic requirement that plaintiff prove by direct or opinion evidence that a negligent act or omission occurred and that the injury resulted therefrom. It is predicated on the theory that the patient's injuries might be the result of some unknown malpractice. When the court decides that the doctrine is applicable, plaintiff may go to the jury without evidence of any particular act or omission and without expert evidence as to whether the unknown act or omission was malpractice, and without expert evidence that the act or omission caused the injuries. California seems to reason backwards from an unintended result to malpractice. Therefore, such decisions may amount to finding liability without fault.⁴⁷

The author of the article cited referred to the doctrine in California as a declaration of public policy in disguise. As medical men are too close-mouthed, it suggests, a physician shall be treated like a common carrier and be liable for a bad result unless the jury exonerate him. He urged that the doctrine be recognized for what it is and rejected.⁴⁸

The statute of limitations, of course, is a defense to *res ipsa* that should be mentioned.⁴⁹

Numerous vices are inherent in a distortion of the *res ipsa loquitur* doctrine.⁵⁰ First, it is unfair to the jury in professional liability cases in that the members are not equipped with the medical education and assistance they require to arrive at a fair judgment. Second, the physician, surgeon or dentist may be subjected to a verdict based on sympathy and speculation. It would seem that the physician, as a professional man licensed by the state and dedicated to high ethical standards, should be entitled to the presumption that he has exercised reasonable care rather than the contrary as imposed by the *res ipsa loquitur* doctrine.

⁴⁷ *Id.* at 1053.

⁴⁸ *Id.* at 1055.

⁴⁹ See, *Borgia v. City of N. Y.*, 12 N. Y. 2d 151, 187 N. E. 2d 777 (1962), citing many cases; *Baum v. Turel*, 206 F. Supp. 490 (D. C. N. Y. 1962). But not as to claim for loss of consortium, *Conway v. Ogier*, 184 N. E. 2d 681 (Ohio App. 1961).

⁵⁰ Stetler, *Medical-Legal Relations—The Brighter Side*, 2 *Villa. L. R.* 487 (1957).