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IN A RECENT ISSUE OF THIS REVIEW, George E. Hall quoted one of his mentors to the effect that the *corpus delicti* "don't mean the dead body!" [1]. One could multiply examples: "negligence" does not mean "carelessness"; "virgo intacta" is a technical term only, and so on. *Res ipsa loquitur* does not mean "the thing speaks for itself." It implies both more and less than this.

As originally applied, it referred only to accidents caused by a "thing" or an "instrumentality." In the "barrel case," [2] the barrel rolled out of the warehouse, on its own, so to speak—the exact cause of the accident remains unknown.

In the celebrated instance of bags of sugar being dropped from a warehouse onto a customs officer, the Court held:

> 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.[3]

The application of the maxim, under these circumstances, is settled law in the common law provinces in Canada. Likewise under the Civil Code of the Province of Quebec, Article 1054 provides that a person is liable for damage done by "things under his care," unless he can show that he was not reasonably able to prevent such damage.

However, over the years there has been an extension of application to cases where the accident is due to a *known human* agency.

Whether the maxim should apply in malpractice cases, in particular in situations where the plaintiff can have no knowledge of what went on, as in anesthetic explosions or the "swab" cases, is a question which has vexed and confused Canadian legal minds.

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1 Hall, Lawyer meets Forensic Pathologist, 9 Clev-Mar. L. R. 238 (1960).

2 Byrne v. Boadle, (1863) 2 H and C. 722.

3 Scott v. London and St. Katherine's Dock Co., (1865) 3 H and C. 596.

We do not intend here to advocate or condemn its application in malpractice cases, but simply to indicate the cases where it was or was not applied, relying where possible on direct quotation from the judgments.

The rule has been applied in one leading case of anesthetic malpractice in this country,[4] but to understand the reasons for its application in that case it is necessary to review some earlier British and Canadian decisions.

The New Brunswick Decisions

In an action arising out of damage caused by leaving part of a pair of forceps in the plaintiff's abdomen, the Court said:

> There are many cases in which the accident speaks for itself, so that it is sufficient for the plaintiff to prove the accident and nothing more . . . It is for the defendant, if he can, to persuade the jury that the accident arose through no negligence of his. The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant, that a reasonable jury could find, without evidence, that it was so caused.[5]

In 1937, Baxter, *C. J.*, of the New Brunswick Supreme Court, talking of the same case, held:

> it is simply a case of *res ipsa loquitur* . . . The law is that when an accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it is a case for *res ipsa loquitur*. The learned trial judge so found, and I think there can be no possible doubt that he was right in doing so.[6]

The Ontario Decision

The Ontario Courts are not obliged to follow the judgments in other provinces or in England. Such decisions are merely persuasive.

In 1937, in a case where a patient had been burned with a diathermy apparatus, Masten, *J. A.*, of the Ontario Court of Appeal said:

> . . . the principle of *Scott v. London & St. Katherine's Dock Company*[7] appears to me to apply and cast on the defendant

[4] Crits and Crits v. Sylvester, (1956) 1 D. L. R. (2d) 502; Sylvester v. Crits, 1956) 5 D. L. R. (2d) 601.

[5] Taylor v. Gray, (1936), XI Mar. Prov. Rep. 588.

[6] Taylor v. Gray, (1937) 4 D. L. R. 123.

[7] Supra, n. 3.

> the onus of affording such an explanation as rebuts the implication of negligence; but as stated above no such explanation is given.[8]

The Supreme Court of Canada subsequently confirmed the decision of the Court of Appeal and Davis, *J.*, said:

> the Court of Appeal . . . treated the case as one of *res ipsa loquitur* . . . It is unfortunate that the maxim of *res ipsa loquitur* which serves satisfactorily when applied to certain cases, where the cause of the accident is known, has become a much overworked instrument in our Courts in recent years and has been extended to apply to a great many different sets of facts and circumstances to which the rule, when correctly stated and confined, has little or no application. The rule is a special case within the broader doctrine that the Courts act and are entitled to act upon the weight of the balance of probabilities.[9]

However, two years later, McTague, *J. A.*, said:

> The doctrine of *res ipsa loquitur*, no matter how ingeniously stated, has no application to malpractice cases.[10]

In 1942 in the Ontario High Court, Hope, *J.*, ruling in a case of alleged anesthetic malpractice, said, talking of *res ipsa loquitur*:

> Although there seems to be some divergency of view in other jurisdictions as to the applicability of this principle to cases of malpractice, I am required to follow the application of the principle as determined by the Ontario decisions.

He did not allow the maxim to be applied in that particular case.[11]

In an action resulting from a fatality following a spinal anesthetic, heard before the Ontario High Court in 1945, Mr. Justice LeBel said, as to the burden of proof:

> It is clear, on the facts of this case, at any rate, that the burden is upon the plaintiff to prove that the defendants, or either of them, were negligent or unskillful.[12]

The leading decision in Ontario, where the maxim was applied, is *Holt v. Nesbitt*.[13] A dental patient was asphyxiated by a throat pack. Judge Advocate Laidlaw said:

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[8] Fleming v. Sisters of St. Joseph.

[9] Sisters of St. Joseph v. Fleming, (1938) 2 D. L. R. 417.

[10] Clark v. Wansbrough, (1940) O. W. N. 67.

[11] Hughston v. Jost, (1943) 1 D. L. R. 402.

[12] Walker v. Bedard and Snelling, (1945) 1 D. L. R. 529.

[13] Holt v. Nesbitt, (1951) 4 D. L. R. 478.

> The learned trial judge [Aylen, *J.*,] stated in his judgment "there is ample authority for the statement that the doctrine of *res ipsa loquitur does* not apply in such cases, and some act of negligence must be proved."
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> However, he disagreed with this point of view:
> In *Mahon v. Osborne* [an English decision[14]] it was held by McKinnon and Goddard, *L. J. J.* (Scott, *L. J.* dissenting), that where . . . a swab . . . was left in a patient's body. . . the rule applied so as to shift the burden of proof to the defendant.
>
> And later:
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> Scott, *L. J.*, was of the opinion that the rule did not apply to the circumstances of the particular case, but he did not decide that it did not apply in any malpractice case. On the contrary, it may be inferred from his reasons for judgment that in his opinion there may be circumstances where the rule is applicable in actions of negligence against a surgeon. . . In the light of the judgment of the Court in *Mahon v. Osborne,* I am not prepared to accept or follow the opinion of McTague, *J. A.*, quoted above in *Clark v. Wansbrough* (see n. 10, above).
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> Hogg, *J. A.*, said, agreeing with Laidlaw, *J. A.*
>
> I think the conclusion may be drawn . . . that where the negligence alleged is against a professional man such as a surgeon or dentist in the practice of his profession, the rule of *res ipsa loquitur* is in general applicable.

The defendant subsequently appealed the case to the Supreme Court of Canada,[15] but was again unsuccessful. Kerwin, *J.*, disapproved the opinion in *Clark v. Wansbrough* and quoted with approval Davis, *J.*, in *Sisters of St. Joseph v. Fleming* (see n. 9, above). He went on to say that the maxim could apply in negligence cases depending on the circumstances, and that it applied here.

The English Decisions

It will be noted that Laidlaw, *J. A.*, relied heavily on *Mahon v. Osborne,* although not bound to do so, and it is of interest to consider this decision and those that followed it in England. This was a "swab" case. The trial judge had found against the defendant surgeon who subsequently appealed. The appeal was

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[14] Mahon v. Osborne, (1939) 1 All E. R. 535.

[15] Nesbitt v. Holt, (1953) 1 D. L. R. 671.

allowed. Scott and McKinnon, *L. J. J.*, gave the majority ruling with Goddard, *L. J.*, dissenting. In their judgments, Scott, *L. J.*, disapproved of applying *res ipsa loquitur* to "swab" cases in general; McKinnon, *L. J.*, implied that it applied to the facts in this case; Goddard, *L. J.*, gave a strongly reasoned case for applying the maxim to "swab" cases in general.

Lord Justice Goddard dissented from his brethren as to the finding, but the dissenting opinion regarding the point of law is that of Scott, *L. J.* The latter said:

> It is difficult to see how the principle of *res ipsa loquitur* can apply generally to actions for negligence against the surgeon for leaving a swab in a patient, even if in certain circumstances, a presumption may arise . . . To treat the maxim as applying in every case where a swab is left in the patient seems to me an error of law. The very essence of the rule, when applied to an action for negligence is that, upon the mere fact of the accident happening, for example an injury to the plaintiff, there arise two presumptions of fact (1) that the event was caused by a breach, by somebody, of the duty of care towards the plaintiff, and (2) that the defendant was that somebody. The presumption of fact arises only because it is an inference which the reasonable man, knowing the facts would naturally draw, and that is in most cases for two reasons (i) that the control over the happening, in such an event, rested solely with the defendant, and (ii) in the ordinary experiences of mankind, such as event does not happen unless the person in control has failed to exercise due care . . .
>
> In the present case . . . I cannot see how it can be said that the first essentials of this rule, if it can be called a rule, apply. It is not necessary to enter upon any analysis of the rule, which as Lord Shaw said in *Ballard v. The North British Railway Company*,[16] nobody would have called it a principle if it had not been in Latin . . . Where complete control rests with the defendant, and it is the general experience of mankind that the accident in question does not happen without negligence, the maxim may well apply.

McKinnon, *L. J.*, who joined Scott, *L. J.*, in the majority judgment said:

> The plaintiff, having no means of knowing what happened in the theatre, was in the position of being able to rely on the maxim *res ipsa loquitur*, so as to say, that some one or more of these five [surgeon, anesthetist, and three nurses] must have been negligent, since the swab was, without question left in the abdomen of the deceased.

[16] Ballard v. North British Railway Co., (1923) S. C. 43.

Goddard, *L. J.*, in his dissenting judgment said:

> In my opinion, the doctrine of *res ipsa loquitur* does apply in such case as this . . . There can be no possible question but that neither swabs or instruments are ordinarily left in the patient's body . . . If therefore a swab is left in the patient's body, it seems to me clear that the surgeon is called upon for an explanation.

In 1951 the Court of Appeal held that the rule applied in a case where the patient's hand had been injured by a splint being applied too tightly.[17] Denning, *L. J.*, said:

> If the plaintiff had to prove that some particular doctor or nurse was negligent, he would not be able to do it, but he was not put to that impossible task. He says "I went into hospital to be cured of two stiff fingers; I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it, if you can!" I am quite clearly of the opinion that this raises a *prima facie* case against the hospital authorities . . . which they have not . . . displaced . . . and are liable in damages to the plaintiff.

In the same case, Somervell, *L. J.*, said:

> . . . the hospital was responsible for all those in whose charge the plaintiff was . . . The result seems to raise a case of *res ipsa loquitur.*

In a case heard before the Court of Appeal in 1954,[18] which arose from the inadvertent injection of phenol into the spinal canals of two patients, Somervell, *L. J.*, said:

> The learned judge said that the principle of *res ipsa loquitur* could not apply to a case where the operation is, as he held here, under the control of two persons, not in law responsible for each other. Our attention was drawn to some observations in *Mahon v. Osborne* (see n. 14 above) which suggest that this is too widely stated. As to the maxim itself, I agree, with respect, with what was said by Lord Radcliffe in *Barkway v. South Wales Transport Co. Ltd.*[19]:
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> "I find nothing more in the maxim than a rule of evidence of which the essence is that an event which, in the ordinary course of things, is more likely than not to have been caused by negligence, is by itself, evidence of negligence."
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> . . . In a case like this, there are points where the evidence may shift, where a judge or jury might infer negligence,

[17] Cassidy v. Ministry of Health, (1951) 1 All E. R. 574.

[18] Roe v. Ministry of Health; Wooley v. The Same, (1954) 2 All E. R. 131.

[19] Barkway v. South Wales Transport Co., (1950) 1 All E. R. 403.

particularly if available witnesses, who could throw light on what happened, were not called.

In the same case, Lord Justice Denning said:

The Judge has said that those facts do not speak for themselves, but I think they do. They certainly call for an explanation . . .

However, he felt that the defendants *had* given an explanation and held that "once the accident is explained, no question of *res ipsa loquitur* arises." Commenting on the position where co-defendants are not responsible, in law, for each other, he said that they could not:

both avoid giving an explanation by the simple expedient of each throwing the responsibility on the other. If an injured person shows that one or the other, or both of two persons injured him, but cannot say which of them it was, then he is not defeated altogether. He can call on each of them for an explanation.

Lord Justice Morris, in dealing with this last point, said that it did not arise in this case as the anesthesiologist was the servant of the Ministry of Health. He referred to *res ipsa loquitur* as "this convenient and succinct formula" but pointed out that it "possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin."

The Ontario Case Involving an Anesthetic Explosion

This essentially was the background with regard to the application of the doctrine when the case involving an anesthetic explosion came to trial.[20] The infant plaintiff had been injured by an explosion of oxygen and ether just prior to a proposed tonsillectomy. On his behalf an action was launched against the hospital, the surgeon and the anesthesiologist.

In the Court of first instance, Mr. Justice Smily referred to the opinions of Somervell and Denning, *L. J. J.*, in *Roe's* case (see n. 18 above), and quoted the Chief Justice of Canada, Sir Lyman Duff in *United Motor Service, Inc. v. Hutson*:

Broadly speaking in such cases, where the defendant produces an explanation equally consistent with negligence and with no negligence, the burden of establishing negligence still remains with the plaintiff.[21]

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[20] Crits v. Sylvester, (1955) 3 D. L. R. 181.

[21] United Motor Service Inc. v. Hutson, (1937) 1 D. L. R. 73.

The Court felt that *res ipsa loquitur* should not apply and found for all defendants. On appeal, however, the decision was reversed. Judge Advocate Schroeder said:

> Certainly the circumstances of the present case are such as to entitle the plaintiff to invoke the rule of *res ipsa loquitur*. In my opinion the facts do speak for themselves and call upon the defendant S., for an explanation . . . Has the defendant S. given an explanation as consistent with the absence of negligence, as with negligence on his part? In my opinion he has not.

The case against the defendant hospital and surgeon was withdrawn before judgment. The Judge Advocate was not therefore obliged to comment on the interesting question whether the maxim would apply if there were more than one defendant, not responsible to each other, where one or the other, but not both, had been at fault. This matter would seem therefore to be an open question at the moment. The Supreme Court of Canada subsequently upheld the decision of the appellate court, but did not comment on the aspect under discussion.

Decisions in the Common Law Provinces

In 1949, the Manitoba Court of Appeal (McPherson, *C. J. M.*, Coyne and Dsyart, *J. A. A.*,) did not apply the doctrine in a case where a surgeon omitted to remove a throat pack after a tonsillectomy. In finding against the defendant, Coyne, *J. A.*, said:

> The doctrine of *res ipsa loquitur* was raised, but it does not apply here as the cause of the accident and the surrounding circumstances are all known.[22]

In 1942, Bigelow, *J.*, of the Saskatchewan Court of King's Bench, trying a case where the plaintiff had developed an abscess after giving blood, held that the plaintiff could rely on the doctrine.[23] However, Gordon, *J. A.*, of the Court of Appeal considered that it did not apply.[24]

In 1956, in a "swab" case, Doull, *J.*, of the Supreme Court of Nova Scotia did not apply the doctrine, but it is apparent that this was because of the fact situation. The swab was in the patient's body, but it was uncertain at which, of six possible operations, the oversight had occurred. The Court indicated that had

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[22] Anderson v. Chasney, (1949) 4 D. L. R. 71.

[23] Cox v. Saskatoon, (1942) 1 D. L. R. 74.

[24] Cox v. Saskatoon, (1942) 2 D. L. R. 412.

there only been one operation, the presence of the swab might be "sufficient proof of negligence." [25]

Decisions in the Province of Quebec

In Quebec, the jurisprudence is that of the civil law as covered by the articles of the Civil Code. However, even in that province, the maxim has been discussed. In a malpractice case involving damage from an improperly applied and unorthodox method of leg traction, Mr. Justice Brossard of the Superior Court of Montreal said in 1955:

> If ever there was a case where the rule *res ipsa loquitur* is applicable, this present case is the one.

It may be, however, that this was just a manner of speaking, since he was referring, we feel, not to the case as a whole, but rather commenting about a particular circumstance. However, later on he said:

> Once Plaintiff had established that the method employed by Defendant N., was not of recognized practice, and that . . . it was by its very nature liable to cause pressure sores, Plaintiff had fully discharged his burden of proof. The burden then shifted to the Defendant to justify that his conduct was not, in fact, faulty.[26]

The judgment went against the defendant surgeon, who subsequently appealed. Mr. Justice Hyde of the Court of Queen's Bench (Appeal side) had this to say:

> I feel it necessary . . . to take respectful exception to reliance on this rule *res ipsa loquitur* as such. This rule is borrowed from the common law and as it is liable to carry with it certain overtones which are not necessarily applicable in this Province, I think it is just as well to avoid it.[27]

In a "swab" case heard before Judge Lalonde of the Quebec Superior Court in 1953, the Court said:

> The sum total of the facts . . . create a presumption [of] negligence, because it is inconceivable, even if we must set aside all legal and judicial considerations, to believe that it is normal that a swab should be lost during a surgical operation.

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[25] Petite v. McLeod, (1956) 1 D. L. R. 147.

[26] Mellen v. Nelligan, (1956) Rev. Leg. 129.

[27] X v. Mellen, (1957) Q. B. (C. A.) 389.

The Court felt that the defendant surgeon had failed to exculpate himself from the presumption of negligence thus created. In effect this is *res ipsa loquitur*.[28] On appeal by the defendant, the decision was upheld by Martineau and Gagne, *J. J.* (McDougall, *J.* dissenting). In his dissenting opinion McDougall, *J.*, said:

> I am of the opinion that this is not a case, in the final analysis for the application of the rule *res ipsa loquitur;* any presumption of negligence arising from that principle or rule having been clearly rebutted. The rule or principle of *res ipsa loquitur* is nothing more than the presumption envisaged by Article 1238 of the Civil Code . . . Until proof is made, the presumption persists but defendants are entitled to bring evidence to rebut it.[29]

Summary

The maxim was first applied in a Canadian malpractice case in 1937 in New Brunswick. It was not similarly used in any jurisdiction in the United States 'til 1944.[30] In England there was the dissenting judgment of Lord Justice Goddard in 1939 and the doctrine was used in 1951.

In Ontario the doctrine was not applied in any malpractice case 'til 1951 and not in a case of anesthetic malpractice 'til 1955. Although this common law doctrine is, strictly speaking, not recognized under the civil law in Quebec, it was applied in that province in a malpractice case in 1957.

As is evident from the above exegesis, the spectrum of judicial opinion on this vexed question is quite as broad in Canada as in the United States. Julien C. Renswick, in a recent paper,[31] thought that the chief reason for the courts approving the doctrine was the unwillingness of physicians to testify on behalf of the plaintiff. We are not competent to assess the importance of this factor in the United States, although such a "conspiracy of silence" has been referred to, even in the lay press.[32] We doubt if this factor is the significant reason for the approximately simultaneous use of the principle in England and Canada. We rather

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[28] King v. Elder, S. C. #280274 (1953) (unreported).

[29] Elder v. King, (1957) Q. B. (C. A.) 87.

[30] Ybarra v. Spangard, 154 P. 2d 687 (Cal. 1944).

[31] Renswick, Res Ipsa Loquitur in Hospital and Malpractice Cases, 9 Clev-Mar. L. R. 199 (1960).

[32] Silverman, Doctors in Court, Sat. Eve. Post, April 18, 1959.

favor Renswick's second reason—a method of redressing the balance in favor of a plaintiff who had no means of telling what had happened during the material time when he was injured.

As Wasmuth says: "It all began 100 years ago, when a barrel of flour fell from a warehouse and a learned judge spoke those catchy Latin words: RES IPSA LOQUITUR." [33]

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[33] Wasmuth, Legal Pitfalls in Anesthesia, 37 Anesthesia and Analgesia 385 (1958).