Negligence - Res Ipsa Loquitur - Medical Malpractice

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NEGLIGENCE—RES IPSA LOQUITUR—MEDICAL MALPRACTICE—The Pennsylvania Supreme Court has held that the doctrine of res ipsa loquitur may be applied in medical malpractice cases.


Mary Belle Jones was suspected of having certain gynecological problems by Dr. Charles R. Beittel, Jr. In order to diagnose her condition and remedy any abnormality, Dr. Beittel operated on Mrs. Jones on May 19, 1972 at the Harrisburg Polyclinic Hospital.\(^1\) The surgery consisted of a D&C,\(^2\) a laparoscopy,\(^3\) and a laparotomy.\(^4\)

Dr. Beittel participated in all three procedures even though the laparoscopy was primarily performed by a Dr. Rohrabaugh.\(^5\) Also involved with Mrs. Jones’ care in the operating room were Dr. Milan Chepko\(^6\) and Patricia McAloose.\(^7\)

The three procedures required different positions on the operating table. During the D&C, Mrs. Jones was flat on her back with her legs in stirrups. She was also flat on her back with her legs still in stirrups and in the Trendelenberg position\(^8\) for the laparoscopy. After the laparoscopy, Mrs. Jones’ legs were removed from the stirrups and she was taken out of Trendelenberg position. At this time, the operating table and the patient were parallel to the floor. Subsequent to the incision for the laparotomy, Mary Jones again was placed in Trendelenberg position to facilitate the examination

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2. Id. at 468, 437 A.2d at 1135. Dilation and curettage (D&C) involves the scraping of the interior of the womb. Id. at 468 n.3, 437 A.2d at 1135 n.3.
3. Id. at 468, 437 A.2d at 1135. A laparoscopy is a method of abdominal examination using a lighted tube inserted below the umbilicus. Id. at 468 n.4, 437 A.2d at 1135 n.4.
4. Id. at 468, 437 A.2d at 1135. A laparotomy is the surgical opening of the abdomen. Id. at 468 n.5, 437 A.2d at 1135 n.5.
5. Id. at 468, 437 A.2d at 1135. Dr. Rohrabaugh was not named as a defendant. Id. at 468 n.6, 437 A.2d at 1135 n.6.
6. Id. at 468, 437 A.2d at 1135-36. Dr. Chepko was a resident physician who assisted Dr. Beittel during the procedure. Id. at 468, 437 A.2d at 1136. He was subsequently dropped from the suit. Id. at 468 n.7, 437 A.2d at 1136 n.7.
7. Id. at 468, 437 A.2d at 1136. McAloose was a nurse anesthetist who administered a general anesthetic to the plaintiff Mary Belle Jones. Id.
8. Id. The Trendelenberg position is an angling of the body with the head lowered and feet raised. Id.
of her abdomen. During all three procedures, Mrs. Jones' arm, in which an intravenous line had been placed, was on a board attached to the operating table.

After recovering from the anesthetic, Mrs. Jones complained of pain in her neck, shoulder, and arm. Prior to surgery, the plaintiff had had no history of neck, shoulder, or arm problems. Mrs. Jones was diagnosed as having suprascapular nerve palsy, which was allegedly caused by improper positioning of her arm on the arm board during surgery.

As a result of her injury, Mary Belle Jones and her husband brought suit for medical malpractice against Dr. Beittel, Patricia McAloose, and Harrisburg Polyclinic Hospital. The plaintiffs sought recovery against defendant Beittel on the theories of lack of informed consent and negligence, through the application of the rule of res ipsa loquitur. Harrisburg Polyclinic Hospital was sought to be held liable solely on the basis of respondeat superior.

The jury found for the Joneses against all defendants and awarded plaintiffs $56,000. Defendants McAloose and Harrisburg Polyclinic Hospital, however, had entered into a joint tortfeasor release and settled for $25,000 prior to taking trial testimony. Dr. Beittel filed post trial motions asking for a new trial, judgment notwithstanding the verdict, and a modification of the verdict based on the joint tortfeasor release. The lower court denied all of the post trial motions. Dr Beittel then appealed, and the supe-

9. Id.
10. Id. at 468-69, 437 A.2d at 1136.
11. Id. at 469, 437 A.2d at 1136.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id. Defendant McAloose was also sought to be held liable for negligence. Id.
17. Id.
18. Id. Plaintiff presented expert testimony at trial which indicated that Mrs. Jones' injury was of a type that usually does not happen in the absence of negligence. Expert testimony also established that the injury most likely occurred in the operating room. Plaintiff's counsel on cross-examination was able to cause Dr. Beittel to admit that it was the operating gynecologist's duty to preserve the patient neurologically throughout the procedure. Jones v. Harrisburg Polyclinic Hospital, 269 Pa. Super. 373, 376-77, 410 A.2d 303, 305 (1979), rev'd, 496 Pa. 465, 437 A.2d 1134 (1981).
19. 496 Pa. at 469, 437 A.2d at 1136.
20. Id.
21. Id.
rior court reversed, granting him a new trial. From this judgment, cross appeals were taken by both the Joneses and Dr. Beittel.

On appeal, the Pennsylvania Supreme Court considered three issues: first, whether the doctrine of res ipsa loquitur can be applied in a medical malpractice case; second, if it is applicable in such cases, whether the Joneses offered evidence sufficient as a matter of law to support the verdict on the basis of res ipsa loquitur; and third, whether the joint tortfeasor's release executed between the Joneses and defendants McAloose and Polyclinic Hospital required that the verdict against Dr. Beittel be reduced by two thirds rather than one half, where the hospital's liability was predicated solely on the basis of respondeat superior.

Justice Nix, writing for the majority, observed that in *Gilbert v. Korvette's, Inc.*, the Pennsylvania Supreme Court had adopted the Restatement (Second) of Torts, section 328 D formulation of res ipsa loquitur. He noted that section 328 D provides that negligence may be inferred where the event usually does not occur absent negligence, where other causes have been eliminated, and where the negligence is within the scope of the defendant's duty to the plaintiff.


23. 496 Pa. at 469, 437 A.2d at 1136. By agreement, the Joneses were designated appellants and Dr. Beittel, appellee. Id.

24. Id. at 470, 437 A.2d at 1136. See infra notes 59-67 and accompanying text.

25. Justice Nix's majority opinion was joined in by Justices Larsen, Flaherty, and Kaufmann. Justice Roberts filed a concurring opinion in which Justice Wilkinson joined. Justice O'Brien took no part in the consideration or decision of the case. 496 Pa. at 480, 437 A.2d at 1142.


28. 496 Pa. at 470, 437 A.2d at 1136.

29. Id. at 470, 437 A.2d at 1136-37. Specifically, § 328 D provides:

(1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when

(a) the event is of a kind which ordinarily does not occur in the absence of negligence;

(b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of defendant's duty to the plaintiff.

(2) It is the function of the court to determine whether the inference may reasonably be drawn by the jury, or whether it must necessarily be drawn.

(3) It is the function of the jury to determine whether the inference is to be drawn in
Justice Nix explained that under prior Pennsylvania law, there existed three theories under which negligence could be inferred from particular circumstances. By the adoption of the Restatement view these earlier theories, which had combined substantive and procedural consideration with the evidentiary concerns associated with res ipsa loquitur, had been rejected in favor of a rule which clearly identifies the evidentiary concerns that should be considered when the doctrine is sought to be applied. Justice Nix maintained that after Gilbert, res ipsa loquitur was viewed as neither a rule of procedure nor a rule of substantive tort law, but rather as a rule of evidence.

The court pointed out that prior to Gilbert, Pennsylvania courts had suggested that theories of presumed negligence might not be applicable in medical malpractice cases. These earlier courts had reasoned that the mere happening of an accident or an unfortunate result was not enough to establish negligence on the part of a defendant. The Jones majority noted that prior law did, however, eliminate the need for expert testimony where medical negligence was so obvious that it could be ascertained by a layman.

In considering whether res ipsa loquitur, specifically section 328 D, should be applied in medical malpractice cases, the majority pointed out that courts in most jurisdictions recognize that the doctrine does have its place in medical malpractice. The court also noted that the “conspiracy of silence” among physicians, which often hampered efforts to obtain expert testimony, created any case where different conclusions may reasonably be reached.

Restatement (Second) of Torts § 328 D (1965).

30. 496 Pa. at 470 n.8, 437 A.2d at 1137 n.8. The three theories were res ipsa loquitur, exclusive control, and an untitled simple circumstantial evidentiary theory. Id.
31. Id. at 470-71, 437 A.2d at 1137.
32. Id. at 471, 437 A.2d at 1137.
33. Id. See Nixon v. Pfahler, 279 Pa. 377, 124 A. 130 (1924); Stemons v. Turner, 274 Pa. 228, 117 A. 922 (1922). The belief was that the plaintiff should be required to prove by expert testimony that the procedures employed were not in line with standard medical practice. 496 Pa. 471, 437 A.2d at 1137. See also Fala, The Law of Medical Malpractice in Pennsylvania, 36 U. PITT. L. Rev. 203, 220 (1974).
34. 496 Pa. at 471, 437 A.2d at 1137.
36. 496 Pa. at 471-72, 437 A.2d at 1137. Earlier it had been thought that the doctrine could have no place in medical science because so many intangibles and uncertainties were involved that the occurrence of a bad result could never justify an inference of negligence, and that all features of medical treatment could be interpreted and judged by physicians only. Id. (quoting Fala, supra note 33, at 219).
grave injustices in certain cases. Section 328 D, the court stated, was created to apply in all instances where negligence could be inferred, whether involving a medical procedure or not. The section was based on the premise that certain factual situations demand an inference of negligence.

The majority stated that it was satisfied that expert testimony should no longer be a per se requirement in proof of negligence in all cases of alleged malpractice. Expert testimony, explained Justice Nix, would only be necessary where there was no fund of common knowledge from which a layman could reasonably infer negligence. Thus, the majority concluded, inferences of negligence should be permitted either on the basis of common knowledge or on the basis of expert testimony establishing that the unexpected result was most likely the result of negligence. There no longer need be a reluctance to permit circumstantial proof of negligence where the reliability of inferences sought to be drawn is provided by the nature of the evidence.

Justice Nix explained that this change in Pennsylvania law was based on the recognition that the law must be responsive to new conditions and to the persuasion of superior reasoning. He maintained that the need for an inference of negligence is especially obvious in a situation where a plaintiff is rendered unconscious and then receives injuries. In such a case, the plaintiff would be unable to establish negligence without the application of res ipsa loquitur.

37. 496 Pa. at 472, 437 A.2d at 1138. The court pointed out that because of the conspiracy of silence among physicians, it was extremely difficult to get one physician to testify as an expert against another. This created grave injustices where a patient lacked the requisite expert testimony to get his or her case to the jury. Id.

38. Id.
39. Id.
40. Id.
41. Id.
42. Id. at 473, 437 A.2d at 1138.
43. Id.
45. 496 Pa. at 474, 437 A.2d at 1139.
46. Id.

[Without the aid of the doctors a patient who received permanent injuries of a serious character, obviously the result of someone's negligence would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.]

After deciding that res ipsa loquitur does have application in medical malpractice cases, the majority addressed the second issue presented by the appeal: whether section 328 D of the Restatement (Second) of Torts had been correctly applied in the instant case. It was undisputed that sections (1)(a) and (1)(c) of section 328 D had been satisfied. However, Dr. Beittel had argued that the plaintiffs had failed to present sufficient evidence to eliminate Dr. Rohrabaugh as an “other responsible cause,” thus failing to meet the requirement of section 328 D(1)(b). Justice Nix pointed out that although Dr. Rohrabaugh had performed the laparoscopy, Dr. Beittel had been present and had participated in the procedure.

As a result, the majority concluded that Dr. Beittel and Dr. Rohrabaugh shared joint responsibility for the positioning of the patient, and therefore, each may be subject to liability.

In further support of his position, Dr. Beittel had argued that the plaintiffs failure to join Dr. Rohrabaugh in their action precluded the application of section 328 D, citing the Minnesota case of *Spannaus v. Otolaryngology Clinic*. In *Spannaus*, the plaintiff had failed to join the anesthesiologist in a malpractice suit for neck damage sustained during vocal chord surgery. The Supreme Court of Minnesota affirmed a judgment for the defendants, pointing out that a requisite for application of res ipsa loquitur under Minnesota law is exclusive control by the defendant of the instrumentality causing the damage. Justice Nix distinguished *Spannaus*, concluding that the resemblances to the instant case were merely superficial. *Spannaus*, explained Justice Nix, had been decided on the basis of Minnesota’s exclusive control doctrine without reference to section 328 D of the Restatement.

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47. 496 Pa. at 474, 437 A.2d at 1139. *See supra* note 29. Justice Nix pointed out that expert testimony to the effect suprascapular nerve palsy does not occur during gynecological surgery absent negligence was uncontradicted, thus satisfying the requirements of section 328 D(1)(a). Likewise, the defendant conceded section 328 D(1)(c) by not asserting that the claimed negligence was beyond the scope of the duty to the plaintiff. 496 Pa. at 475, 437 A.2d at 1139.

48. *Id.* *See supra* note 29. Dr. Beittel argued that it was equally likely that the injury had occurred during the laparoscopy procedure which Dr. Rohrabaugh had performed. 496 Pa. at 475, 437 A.2d at 1139.

49. 496 Pa. at 475, 437 A.2d at 1139.

50. *Id.* The court reasoned that where responsibility is vested in two or more parties, each is subject to potential liability. *Id.* *See* Gilbert v. Korvette’s, Inc., 457 Pa. 602, 614-15, 327 A.2d 94, 110-11 (1974).

51. 397 Minn. 334, 242 N.W.2d 594 (1976).

52. *Id.* at 338, 242 N.W.2d at 597.

53. 496 Pa. at 476, 437 A.2d at 1140. The Minnesota exclusive control doctrine which was applied in *Spannaus*, was found to be inapposite to the res ipsa loquitur rule which
Justice Nix explained that Dr. Beittel's argument, and the holding below in the superior court, were essentially that where another party might be a responsible cause there is an insufficient elimination of a possible "other responsible cause" to comply with section 328 D(1)(b). However, Justice Nix maintained that to follow this reasoning would be to preclude joint responsibility, a result contrary to both the holding in "Gilbert" and to the intent of section 328 D(1)(b). Justice Nix noted that Dr. Beittel had admitted that his duty to monitor Mrs. Jones' position continued throughout the laparoscopic procedure, including the time that Dr. Rohrabaugh was working. He also pointed out that plaintiffs injured by joint tortfeasors have the option of bringing an action against them either jointly or individually, and that if Dr. Beittel believed that Dr. Rohrabaugh was jointly responsible, Dr. Beittel could have joined him as an additional defendant.

Because the evidence established that Dr. Beittel was a responsible cause of Mrs. Jones' injury, the majority concluded that section 328 D(1) had been satisfied. The majority further determined that the lower court had correctly decided that an inference of negligence could reasonably be drawn by the jury, and that the jury had properly drawn such an inference.

The final issue decided by the majority was the degree to which the verdict should be reduced with regard to Dr. Beittel. Dr. Beittel had argued that since there were two other joint tortfeasors, the verdict should be reduced by two thirds instead of one half based

prevails in Pennsylvania. As Justice Nix noted for the majority in "Jones", the exclusive control doctrine "in Pennsylvania has been termed 'a unique sibling of res ipsa loquitur' by Mr. Justice Roberts in "Gilbert v. Korvette's" . . . . With the adoption of section 328 D in this jurisdiction we need no longer be concerned with the technical differences between the former theories of res ipsa loquitur and 'exclusive control.'" 496 Pa. at 476 n.14, 437 A.2d at 1140 n.14 (citation omitted).

54. Id. See supra note 29.
55. 496 Pa. at 477, 437 A.2d at 1140.
He may be responsible, and the inference may be drawn against him, where he shares control with another . . . . Exclusive control is merely one fact which establishes the responsibility of the defendant; and if it can be established otherwise, exclusive control is not essential to a res ipsa loquitur case. The essential question becomes one of whether the probable cause is one which the defendant was under a duty to the plaintiff to anticipate or guard against.

Id. 496 Pa. at 477 n.15, 437 P.2d at 1140 n.15 (quoting Restatement (Second) of Torts § 328 D, comment g (1965)) (emphasis added by "Jones" court).
56. 496 Pa. at 478, 437 A.2d at 1140-41.
57. Id. at 478, 437 A.2d at 1141. See 4A R. Anderson, Pennsylvania Civil Practice § 2252.44 (1962).
58. 496 Pa. 478, 437 A.2d at 1141.
on the joint tortfeasor release. The majority disagreed. Justice Nix explained that when contribution is made among joint tortfeasors, a distinction should be made between primary and secondary tortfeasors. In this case, there were two individuals primarily liable, Patricia McAloose and Dr. Beittel. The hospital was charged with vicarious liability predicated on respondeat superior. Justice Nix observed that in Parker v. Rodgers, the plaintiff had brought suit against two drivers, one of whom owned one of the vehicles, and against the employer of the other driver. The superior court had found that when an employer is held liable solely on the basis of respondeat superior, the employer's share in contribution is identical to the employee's. The majority also noted that in Nationwide Mutual Insurance Co. v. Philadelphia Electric Co., a federal district court applying Pennsylvania law had adopted the rationale of the Parker court. Justice Nix noted that Parker preceded the Pennsylvania Uniform Contribution Among Tortfeasor's Act, but concluded that the rationale of Parker was consistent with the statute's purpose and continued to represent Pennsylvania law.

Justice Roberts filed a concurring opinion stating that in his view, the sole dispute in Jones was whether the plaintiff had sufficiently eliminated other responsible causes. Justice Roberts noted that Dr. Beittel had actively participated throughout the operation and thus, it was reasonable for the jury to conclude that

59. Id.
60. Id. at 478-79, 437 A.2d at 1141.
61. Id. at 479, 437 A.2d at 1141.
63. Id. at 53, 189 A. at 696. In Parker, plaintiff brought an action against Rodgers, Glenzinger, and Pough. Rodgers owned and operated one automobile. Glenzinger drove the other automobile owned by Mrs. Pough. Plaintiff's damages were the result of a collision between these two automobiles. The superior court maintained that since Rodgers and Glenzinger were primarily concerned in the tort and Mr. Pough's involvement was vicarious, Rodgers and Pough together should only be responsible for one half of the damages. Id. at 49-54, 189 A. at 693-96.
65. Id. at 1146-47. "However, this is a suit for contribution and it is not the total number of defendants involved who could have been liable to the deceased's estate but the number of directly and primarily liable parties which determines the number of pro-rata shares." Id. at 1146.
68. 496 Pa. at 480-81, 437 A.2d at 1142 (Roberts, J., concurring).
Dr. Beittel was at all times the "responsible cause" of the injury. 69

Res ipsa loquitur, which translates from Latin as "the thing speaks for itself," developed from a casual remark uttered in an 1863 case. 70 The case involved a barrel of flour which had rolled out of a warehouse window and fallen on a passing pedestrian. 71 Initially, the principle of res ipsa loquitur merely permitted the reasonable conclusion that an unusual accident was most likely the defendant's fault. 72 For instance, it might be reasonable to assume that a barrel falling from a building was the result of the negligence of someone in the building. Later, res ipsa loquitur became intermingled with an older principle, which had placed the burden of proving absence of negligence on common carriers in cases of injuries to passengers. 73 Thus, these two principles, one involving sufficiency of evidence and the other the burden of proof, became intertwined. 74

Wigmore eliminated some of the confusion in res ipsa loquitur law by outlining in his treatise on evidence, 75 three conditions necessary for the application of the doctrine. These conditions were: first, the event must have been of a type which would not ordinarily occur in the absence of someone's negligence; second, the event must have been caused by an agency or instrumentality within the defendant's exclusive control; and third, the event must not have been caused by the plaintiff's voluntary action or contribution. 76

In 1965, the American Law Institute formalized the requirements for the application of res ipsa loquitur. The American Law Institute's view differs from Wigmore's view in two respects. First, Wigmore required the defendant to have exclusive control over the instrumentality, while the Restatement looks only for a duty from defendant to plaintiff. 77 The second difference relates to treatment of the concept of "other responsible causes." Under the Restatement view, the conduct of plaintiff and of third persons should be sufficiently eliminated by the evidence as causes of the unfortunate result. Wigmore, however, only required the elimination of the con-

69. Id. at 481, 437 A.2d at 1142 (Roberts, J., concurring).
72. W. PROSSER, supra note 70.
73. Id.
74. Id.
75. J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW (3d ed. 1940).
76. Id. § 2509.
77. See supra note 29. See RESTATEMENT (SECOND) OF TORTS § 328 D (1965).
duct of the plaintiff.

Recently, the doctrine of res ipsa loquitur has found increasing application in medical malpractice cases. The courts of many American jurisdictions have manifested an awareness of a need to protect patients by requiring physicians to explain injuries. The New Jersey Supreme Court recently reaffirmed a long judicial history of applying res ipsa loquitur in a medical malpractice context in its decision in Buckelew v. Grossbard. In Buckelew, plaintiff, a registered nurse, brought an action for malpractice against her surgeon for bladder injuries which had occurred during an exploratory laparotomy. The superior court entered a judgment notwithstanding the verdict for the physician and the appellate division affirmed. One of the crucial issues on appeal to the supreme court was whether common knowledge alone must determine the probability of the occurrence being the result of negligence. Justice Clifford, writing the majority opinion, stated that expert testimony to the effect that the medical community recognizes that an event does not ordinarily occur in the absence of negligence may afford a sufficient basis for the application of res ipsa loquitur.

The Illinois Supreme Court took an expansive view of the scope of res ipsa loquitur in medical malpractice in its decision in Walker v. Rumer. In Walker, the court decided that the probability of an occurrence being the result of negligence could be established by either common knowledge or expert testimony. Shortly after the Walker decision, the Supreme Court of Illinois clarified the amount and quality of evidence required to prove the probability element of res ipsa loquitur in Spidle v. Steward. Judith Spidle and her husband brought an action in medical mal-

80. 87 N.J. 512, 516-23, 435 A.2d 1167, 1152-55.
81. Id. at 527, 435 A.2d at 1158.
82. Id. The court declined to decide whether expert testimony, without regard to what is a "given" in the medical community, was sufficient to establish that certain events were more likely than not the result of negligence. Id.
83. 72 Ill. 2d 495, 381 N.E.2d 689 (1978).
84. Id. at 501, 381 N.E.2d at 691. Walker was decided on the pleadings.
85. 79 Ill. 2d 1, 402 N.E.2d 216 (1980).
recent decisions

practice for injuries suffered after a laparotomy.\textsuperscript{86} The Illinois Appellate Court affirmed a verdict for the defendant, recognizing that expert testimony may establish the probability element of res ipsa loquitur but reasoning that expert testimony had only established the rarity of plaintiff's injury.\textsuperscript{87} The Illinois Supreme Court reversed, holding that the combination of expert testimony of an unusual occurrence and specific acts of negligence would lead a reasonable person to believe that the patient's injury was likely the result of negligence.\textsuperscript{88}

Although res ipsa loquitur has found increasing application in cases of medical negligence, some jurisdictions have refused to apply the doctrine in malpractice cases, while others have applied it only very cautiously. For example, the United States District Court for the Northern District of Texas, interpreting Texas law, refused to apply res ipsa loquitur in \textit{Shevak v. United States}.\textsuperscript{89} The district court pointed out that Texas law imposes an affirmative duty on the plaintiff to prove that the doctor's negligence was the cause of the injury and presumes that a physician performed his work properly.\textsuperscript{90}

Of those courts which do employ the doctrine, some refuse to apply it where the only ground to do so is that a rare result has occurred.\textsuperscript{91} The courts reason that this would place too great a burden on the medical profession and might result in an undesirable limitation on the use of procedures with inherent risks.\textsuperscript{92} For example, in \textit{Hyder v. Weilbaecher},\textsuperscript{93} the court held that a surgeon is

\textsuperscript{86} Id. at 5, 402 N.E.2d at 217.


\textsuperscript{88} 79 Ill. 2d at 9-11, 402 N.E.2d at 220. Expert testimony established here that plaintiff's injury was rare and that defendant operated at the wrong time. See also Van Zee v. Sioux Valley Hosp., 315 N.W.2d 489 (S.D. 1982), in which the plaintiff was permitted a jury instruction on res ipsa loquitur when three out of four experts had opined that defendant's action had not caused plaintiff's injury. The Supreme Court of South Dakota reasoned that the one favorable testimony "pierced the shroud of silence that often surrounds the testimony of physicians who are hesitant to testify against another member of the medical profession." Id. at 494.

\textsuperscript{89} 528 F. Supp. 427 (1981).

\textsuperscript{90} Id. at 531.


\textsuperscript{92} See, e.g., Siverson v. Weber, 57 Cal. 2d 834, 22 Cal. Rptr. 337, 372 P.2d 97 (1962) (the fact that a fistula is an unusual complication following a hysterectomy does not establish that the surgeon was negligent; an inference of negligence would place too great a burden on use of operations and new procedures).

\textsuperscript{93} 54 N.C. App. 287, 283 S.E.2d 426 (1981).
not ordinarily an insurer of success, and in medical malpractice cases there is generally no presumption of negligence in the failure to successfully effect a remedy.94

Pennsylvania certainly has not been spared the confusion which resulted from the intermingling of res ipsa loquitur as a principle of circumstantial evidence and the older precedent allocating the burden of proof in common carrier cases. This confusion lead Pennsylvania courts to restrict the use of res ipsa loquitur to cases in which the defendant owed the plaintiff the highest degree of care.95 This class of defendants included owners and operators of common carriers, elevators, escalators, and suppliers of electrical power.96 Having limited res ipsa loquitur to a small group of defendants, Pennsylvania courts began to utilize two other doctrines of circumstantial proof. These doctrines were “exclusive control”97 and an untitled evidentiary rule of simple circumstantial evidence.98

In 1974, the Pennsylvania Supreme Court significantly changed res ipsa loquitur law by its decision in Gilbert v. Korvette’s, Inc.99 Gilbert involved an action brought against a department store (Korvette’s) and an escalator manufacturer (Otis) for injuries sustained by a child when his foot became caught in an escalator. The jury was instructed on res ipsa loquitur and verdicts against both defendants were returned.100 The Pennsylvania Superior Court affirmed the verdict as to Korvette’s because Korvette’s was the

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94. Id. at 288, 283 S.E.2d at 427.
96. 457 Pa. at 606-07, 327 A.2d at 97.
97. Id. at 607-08, 327 A.2d at 98. The exclusive control doctrine raised an inference of negligence and shifted the burden of proof to the defendant.
98. The doctrine should be applied only where all of the following elements are present: (a) where the thing which caused the accident is under the exclusive control of or was made or manufactured by the defendant; and (b) the accident or injury would ordinarily not happen if the defendant exercised due care, or made or manufactured the article with due care; and (c) where the evidence of the cause of the injury or accident is not equally available to both parties, but is exclusively accessible to and within the possession of the defendant; and (d) the accident itself is very unusual or exceptional and the likelihood of harm to plaintiff or one of his class could reasonably have been foreseen and prevented by the exercise of due care; and (e) the general principles of negligence have not theretofore been applied to such facts.
99. 457 Pa. at 609, 327 A.2d at 98.
100. Id. at 604, 327 A.2d at 96.
Recent Decisions

owner of a common carrier and owed the "highest degree of care." Otis was awarded a new trial because Otis did not owe the "highest degree of care," and therefore, a res ipsa loquitur instruction was improper. The supreme court granted an appeal limited to a determination of whether the case against Otis was properly presented to the jury on res ipsa loquitur instructions.

Justice Roberts, expressing the opinion of the court in Gilbert, carefully analyzed the state of res ipsa loquitur in Pennsylvania. He pointed out the confusion present in Pennsylvania law due to the intermingling of res ipsa loquitur as a rule of circumstantial evidence and the determination of the duty owed by defendant to plaintiff. Justice Roberts mentioned a sibling of res ipsa loquitur termed "exclusive control" which had appeared in Pennsylvania. In cases employing the exclusive control formulation, the courts were unable to fully recognize that circumstantial evidence may be adequate to establish negligence. Justice Roberts also noted that exclusive control, a theory similar to res ipsa loquitur, had been very narrowly applied in Pennsylvania. According to Justice Roberts, Pennsylvania found itself with three companion doctrines — res ipsa loquitur, exclusive control, and an evidentiary rule of simple circumstantial evidence.

The Gilbert court attempted to displace the confusion generated by the three doctrines with a single doctrine of res ipsa loquitur. Res ipsa loquitur, held the Gilbert court, henceforth would not be associated with questions of duty but would only be a shorthand expression for circumstantial proof of negligence. The single doctrine accepted by the supreme court in Gilbert was section 328 D of the Restatement (Second) of Torts. As pointed out by Justice Roberts, the Restatement rule eliminates any requirement of exclusive control. The critical question under the Restatement is, "who is the responsible cause?" Responsibility can be shared, with each of several parties potentially subject to liability under the Restatement rule.

101. Id.
102. Id.
103. Id. at 604-07, 327 A.2d at 96-98.
104. Id. at 608, 327 A.2d at 98.
105. Id. at 608-09, 327 A.2d at 98.
106. Id. at 609, 327 A.2d at 98.
107. Id. at 611, 327 A.2d at 99.
108. Id. at 612, 327 A.2d at 100. The Gilbert majority was convinced that the Restatement rule was "a far more realistic, logical, and orderly approach to circumstantial proof of negligence than the multiple doctrines formerly employed in Pennsylvania." Id. at 611, 327 A.2d at 100.
Thus, the Gilbert decision set the stage in Pennsylvania for a change in medical malpractice law. Prior to Gilbert, Pennsylvania courts had been steadfast in refusing to infer negligence from the mere happening of an unexpected result.\(^{110}\) This refusal was reaffirmed by the Pennsylvania Supreme Court as late as 1966.\(^{111}\) The only exception to this otherwise invariable rule was in cases where the matter under investigation was so simple and the lack of skill or want of care so obvious as to be within the range of the ordinary experience and comprehension of even non-professional persons.\(^{112}\)

*Jones v. Harrisburg Polyclinic Hospital* represents the final step in the transition of res ipsa loquitur law in medical malpractice in Pennsylvania. In *Jones*, the court has permitted an inference of negligence even where expert testimony was necessary to establish that an event would not ordinarily occur absent negligence.\(^{113}\) The decision is an expansion of prior law which permitted a res ipsa loquitur inference only where negligence could be inferred as a matter of common knowledge.\(^{114}\) Thus, section 328 D permits the inference of negligence in two situations: first, where it is obvious to the layman that the event would not occur absent negligence, which is analogous to the previous standard of common knowledge as the basis of the inference; and second, where medical knowledge is relied upon to establish that the event would not occur absent negligence.\(^{115}\) The second situation represents the area of expansion of the doctrine with regard to medical malpractice.

Unfortunately, the factual situation in *Jones* raises some

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109. Id. at 614, 327 A.2d at 101.
110. See Stemons v. Turner, 274 Pa. 228, 117 A. 922 (1922). In Stemons, the trial judge had instructed the jury “that it was the duty of defendants to use a 'high' degree of care.” Defendant was an osteopathic physician who had injured the plaintiff during the use of an x-ray. The Pennsylvania Supreme Court found the trial judge’s instructions to be in error. The court reiterated the rule laid down by prior cases holding defendants to ordinary standard of care and refused to apply res ipsa loquitur. Id. at 228, 117 A. at 922.
111. See Lambert v. Soltis, 422 Pa. 304, 221 A.2d 173 (1966). Plaintiff, here, instituted suit against her dentist for pain and loss of teeth. She alleged that this resulted from failure to take x-rays and improper injection of local anesthesia. Plaintiff had failed to offer medical evidence of negligence on defendant’s part, but relied on an unfortunate result as circumstantial proof of negligence. The Pennsylvania Supreme Court affirmed a lower court’s judgment of nonsuit.
113. 496 Pa. at 472-73, 437 A.2d at 1138.
114. See supra text accompanying notes 41 and 42.
115. See 496 Pa. 473, 437 A.2d at 1138.
problems as to whether the case was an appropriate vehicle in which to make this change in the law. Mrs. Jones' nerve injury, upon which her cause of action was based, was unrelated to the part of her body for which she sought treatment. Thus, the injury in Jones arguably fell within the old "common knowledge" area under which prior Pennsylvania law permitted res ipsa loquitur instructions. Because the injury occurred to a completely separate part of the plaintiff's body, the jury might have been able to infer negligence on the basis of its own common knowledge. Nevertheless, expert testimony was offered to the effect that suprascapular nerve palsy does not ordinarily occur during gynecological surgery in the absence of negligence. 116 Although the Jones court applied the second category of section 328 D and permitted an inference based upon medical testimony, this inference was arguably unnecessary to the decision and could constitute dicta. 117

In addition, even if expert testimony was necessary in Jones to establish that the nerve palsy was most likely due to negligence, under the Jones facts an expert could easily infer negligence. There are circumstances, however, where an expert would be placed in a more precarious position. For example, if the post-operative complication had been a cardiac arrest and Mrs. Jones had a previous heart ailment, it would be very difficult for any expert to say with certainty whether the complication was related to the disease or to a negligently administered anesthetic. 118 Thus, it is very easy to imagine expert witnesses being faced with increasingly difficult decisions under this liberalization of the res ipsa loquitur doctrine.

The decision of the Pennsylvania Supreme Court in Jones is the logical conclusion of a gradual change in Pennsylvania law. However, the decision does present the possibility of many potential problems for both the legal and the medical professions. It allows application of res ipsa loquitur in areas where it has never before been permitted. Yet, Justice Nix's opinion gives little guidance in the application of the doctrine, particularly in the more difficult cases.

In addition, the liberalization of the doctrine may affect the

116. See id. at 475, 437 A.2d at 1139.
117. See supra note 47 and accompanying text.
118. Any expert witness would be hard put to give an accurate estimate of the mortality and morbidity associated with a general anesthetic for a healthy individual in Pennsylvania in 1982. Personal conversation with Dr. E.S. Siker, President of the American Board of Anesthesiology (Sept. 7, 1982).
manner in which medicine is practiced. The result may be an increasingly defensive practice of medicine, in which physicians become insurers of success and carry the burden of proving absence of negligence. One method by which a physician might seek to establish absence of negligence or to support a diagnosis is to obtain otherwise unnecessary laboratory tests. Patients will thus be forced to undergo the burdens of time, cost, and risk associated with such tests. The decision in Jones, while meeting a need for an inference of negligence in cases where the plaintiff is unable to establish medical malpractice by direct proof, may nevertheless have a negative effect on society in the form of increased medical care costs.

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120. See Note, supra note 119, at 437.

121. 496 Pa. at 474, 437 A.2d at 1139.