65-year-old man was referred by his orthopedic surgeon to the outpatient radiology section of a local hospital for myelography and spine CT because of lower back pain and clinical findings suggesting spinal stenosis. A hospital-based interventional radiologist performed the lumbar puncture, administered contrast medium intrathecally, obtained myelographic images, and supervised the CT examination. The entire procedure was uneventful. The patient was later discharged and was driven home by a relative. The radiologist interpreted the study as disclosing spinal stenosis without evidence of other pathology.

The following day the patient developed fever, neck rigidity, and a diminishing state of consciousness. By the time his family brought the patient to the hospital’s emergency department, he was unresponsive. Tests disclosed that the patient was suffering from acute Streptococcus bovis meningitis. After a 1-week hospitalization and antibiotic treatment, the patient recovered from the acute meningitis but was left with permanent neurologic deficits, including memory loss, decreased cognitive function, and depression.

The patient later filed a medical malpractice lawsuit against the interventional radiologist under the theory of res ipsa loquitur (res ipsa), alleging that because “the entire myelogram procedure was under exclusive control of the defendant–radiologist” and because “contracting meningitis with S. bovis is a rare medical result that does not occur in the absence of medical negligence,” the defendant–radiologist’s conduct fell below the standard of care.

In his deposition taken during the pretrial discovery period, the expert witness retained by the plaintiff contended that S. bovis meningitis is an extremely rare event and was the result of the introduction of S. bovis bacteria into the patient’s spinal canal during the myelography, most likely due to contamination of the contrast medium or spinal needle used for the myelography. The plaintiff’s expert asserted that the fault lay with the radiologist or technologists under his supervision at the time.

The expert witness retained by the defense, in his deposition, disagreed that the defendant–radiologist was responsible for the complication that arose from the myelographic procedure. The expert pointed out that the myelogram kit or the contrast medium itself may have been contaminated with the S. bovis bacteria before they were placed in the hands of the defendant–radiologist. The expert went on to testify that, although unusual, S. bovis infection secondary to a myelogram is a known risk of the procedure and can occur without negligence. He also added that the bacteria could possibly have already been in the patient’s bloodstream and that the meningitis simply had not become symptomatic until the time of the myelography.

After completion of the depositions of both expert witnesses, the defendant–radiologist, and other individuals who were involved with the myelogram CT procedure, the defense attorney moved for dismissal of the lawsuit, asserting that the plaintiff failed to present sufficient evidence to support the res ipsa theory. The trial judge agreed with the defense attorney’s argument and dismissed the lawsuit.

The plaintiff then appealed the dismissal to the Illinois Appellate Court.

Illinois Appellate Court
Affirms Dismissal

The Illinois Appellate Court upheld the lower court’s dismissal of the lawsuit, stating in part [1]:

Res ipsa loquitur permits a trial of fact to draw an inference of negligence if plaintiff demonstrates he or she was injured in an occurrence that ordinarily
does not happen in the absence of negligence by an agency or instrumentality within the defendant’s exclusive control. Based on the totality of the evidence presented, we find that infection is an outcome that can occur subsequent to a myelogram without any negligence. Plaintiff could not establish that the defendant–radiologist was responsible for the infection, and plaintiff could not establish exclusive control on the part of the defendant. The judgment of the Circuit Court is affirmed.

The plaintiff declined to undertake an appeal to the Illinois Supreme Court.

Meningitis After Myelography

Before delving into the legal aspects of res ipsea, the thrust of this article, a brief discussion of postmyelographic meningitis is in order. Before 1993, there were but 19 cases of postmyelographic meningitis reported in the medical literature [2], only one of which was caused by S. bovis [3]. A review in the orthopedic literature in 1985 pointed out that the true incidence of acute bacterial meningitis after myelography is not known [4], but of the cases that were documented at the time, virtually all were due to a strep bacterium. Additional reports [5–8] reiterated that S. bovis meningitis is quite rare, and when it did occur subsequent to myelography, the mechanism by which the pathogen was acquired remained unknown. Potential sources were listed, however. They included droplet contamination of the field or instruments by the oropharyngeal flora of the operator, contamination of the commercially prepared spinal-puncture equipment, contamination of the contrast medium, cutaneous colonization due to incomplete disinfection of the skin, and inoculation into the spinal fluid by the spinal needle.

Res Ipsa Loquitur: Its Origin and Evolution

Although the first time the term “res ipsea loquitur,” which literally means “the thing speaks for itself,” was used was in an obscure court proceeding demanding payment of a debt in the year 1616 in England [9], an event occurring 247 years later is far more germane to this article.

In 1863, while the Civil War was raging on the American side of the Atlantic Ocean, a little-noticed incident occurred on the English side of the Atlantic that was destined to herald a new legal doctrine into the common law. On July 18 of that year, a man named Byrne was walking in a public street in Liverpool, England. As he was passing a shop owned by Mr. Boadle, a dealer of flour, a barrel of flour suddenly fell on Mr. Byrne from a window above the shop. Byrne was “thrown down, wounded, lamed, permanently injured, suffered great pain and anguish, and was otherwise dammified” [10]. Mr. Byrne filed a lawsuit against Mr. Boadle, alleging negligence on the defendant’s part. However, ruling that the plaintiff was unable to present evidence of negligence on the part of the shop owner, the local trial court judge dismissed the lawsuit. Byrne appealed.

The appeals court, headed by a chief judge named Baron Pollock, reinstated the lawsuit and for the first time in the context of personal injury litigation used the phrase, res ipsea loquitur. Stated the learned judge [10]:

There are many accidents from which no presumption of negligence can arise, but I think it would be wrong to lay down a rule that in no case can presumption of negligence arise from an accident. In this case, the barrel had rolled out of the warehouse and fallen on the plaintiff; how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would beyond all doubt afford evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who was injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous.

The present case on the evidence comes to this: a man is passing in front of the premises of a dealer in flour, and there falls down on him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises and who is responsible for the act of his servants who had the control of it. I think that a person who has a warehouse by the side of a public highway, and assumes to himself the right to lower from it a barrel of flour into a cart, has a duty cast on him to take care that persons passing along the highway are not injured by it. The plaintiff who was injured by it 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. There are certain cases of which it may be said res ipsea loquitur—a doctrine of presumptive negligence—and this seems one of them.

Eleven years later, on the American side of the Atlantic, the Court of Appeals of New York adjudicated a lawsuit with similar issues. While walking on the sidewalk adjacent to a building called the Hamilton Market in the city of Brooklyn, a woman named Mullen was knocked down and injured when suddenly part of the building’s walls fell outward. A lawsuit was filed. At the trial that followed, the local judge instructed the jury that “the happening of the accident was, in the absence of explanation, presumptive evidence of negligence on the part of defendants.” The jury then ruled in favor of the plaintiff. The defendants appealed, claiming that the judge’s instructions were in error. The court of appeals affirmed the judge’s instructions [11]:

If a person erects a building upon a city street, he is under a legal obligation to take reasonable care that it shall not fall into the street and injure persons lawfully there. It cannot be affirmed that he is liable for any injury that may occur; it is not to be disputed, however, that he is liable for the want of reasonable care. Buildings properly constructed do not fall without adequate cause. The fair presumption is that the fall occurred due to the ruinous condition of the building, which could scarcely have escaped the observation of the owner. The mind is thus led to a presumption of negligence on his part, which may, of course, be rebutted.

[This is] a case to which the maxim res ipsea loquitur is applicable, the principle of which is that whenever it is a defendant’s duty to use reasonable care to keep a structure in a proper condition and it is out of condition and an accident happens, it is incumbent on him to show he used reasonable care and diligence. The absence of care may fairly be presumed from the fact that there was a defect from which the accident had arisen.

Over the next 20 years, appeals courts in Wisconsin, Massachusetts, Louisiana, Penn-
Res Ipsa Loquitur and Radiology

Sylvania, and California affirmed the doctrine of res ipsa in other cases involving personal injury. Conflicting opinions regarding the fairness of the res ipsa doctrine erupted, however, in an 1894 Maryland Court of Appeals decision. There, a young man named Houser was walking over a footpath and was struck and badly injured by railroad cross-ties that suddenly fell from a passing train. The plaintiff filed a lawsuit against the railroad, claiming negligence. The case proceeded to trial, at the conclusion of which the trial court judge instructed the jury that the plaintiff was not entitled to recovery because he had offered no proof of negligence. The plaintiff appealed, and in a split decision, the Maryland Appellate Court reversed the jury verdict [12]:

If the cross-ties had been properly loaded, there existed no reasonable probability of their falling off. It was the duty of the defendant to have carefully loaded said cross-ties upon its cars, and it was equally its duty to have exercised reasonable care in seeing that its train was transported in such condition as to avoid all reasonable probability of injury. If the presumption arising out of the doctrine of res ipsa loquitur finds proper application anywhere, we think this is a case in which it should be applied.

Notwithstanding the court's official majority ruling, however, the following dissenting opinion is noteworthy [12]:

We dissent. An accident happened, and the plaintiff was injured. There was no proof of any antecedent negligence on the part of the defendant, and no proof as to what caused the cross-ties to fall from the moving cars. No presumption of negligence can ever arise from the mere fact that an injury has been sustained. Something more must be shown. Where the injury could have happened in consequence of an accident un mixed with negligence and where it could equally have happened as the result of negligence but there is no evidence to show negligence, the plaintiff fails to sustain his case. Negligence in the concrete is either positive or negative. It does not follow that because the logs fell off the car, they were negligently put on. To conclude there was negligence because an injury happened is to assume as proved the very fact to be proved.

As will be seen later in this article, this criticism of res ipsa, written so eloquently 115 years ago, persists today by many in the judiciary.

Res Ipsa Loquitur Makes Its Way Into Medical Malpractice Lawsuits

Before William Howard Taft became the 27th President of the United States in 1909 and then Chief Justice of the United States in 1921 (the only person in history to serve in both positions), he was a federal district court judge in Cincinnati, OH. In 1897, Taft adjudicated what appears to be the first lawsuit attempting to invoke the doctrine of res ipsa against a physician. He rejected the attempt. The case involved a Ms. Nellie Ewing who, having developed cataracts in both eyes, underwent corrective surgery by Dr. Goode, “a highly-educated and experienced physician and oculist of the city, now engaged solely in treating diseases of the eye.” Postoperatively, the patient developed glaucoma and eventually had to undergo removal of the affected eye. Ms. Ewing filed a medical malpractice lawsuit against Dr. Goode under the res ipsa theory, and the case proceeded to a jury trial conducted by Judge Taft. At the conclusion of the trial, Judge Taft instructed the jury to find in favor of the defendant–physician, explaining his reasoning as follows [13]:

When a case concerns the highly specialized art of treating an eye for cataract, and for the mysterious and dreaded disease of glaucoma, with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence. There can be no other guide. The plaintiff called to the witness stand an expert oculist witness who stated with emphasis that the evidence failed to show that the cataract operation had any causal relation to the glaucoma or that there was the slightest want of skill in the performance of the operation or subsequent treatment of the wounded eye.

The naked fact that the eye was in such a bad condition that it had to be extracted established neither neglect nor unskillfulness of the treatment. A physician is not a warrantor of cures. If the maxim res ipsa loquitur were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of 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 of the “ills that flesh is heir to.”

The condition of the plaintiff cannot but awaken the sympathy of everyone, but I must hold that there is no evidence before the court legally sufficient to support a verdict in her favor. I deem it my duty to without hesitation direct a verdict for the defendant.

Notwithstanding Taft’s initial refusal to recognize the validity of the res ipsa doctrine in medical malpractice lawsuits, judges soon thereafter began approving the applicability of the doctrine in malpractice litigation [9].

The Rationale of Res Ipsa Loquitur

The primary purpose of the res ipsa doctrine is to provide fairness to an injured party when direct evidence of negligence is absent [9]. The theory is that it is the defendant who is in a far better position than the plaintiff to ascertain the facts and circumstances surrounding an accident or adverse event because it is often the defendant who has sole possession or control of all information causing the accident. A fundamental component of the res ipsa doctrine is that the act complained of speaks for itself. In other words, in the absence of hard objective evidence of negligence, the act itself is the evidence. The doctrine is not intended to exempt a plaintiff from the traditional burden of proving the defendant’s negligence and, in fact, where the plaintiff is in a position to produce evidence of negligence, res ipsa is not available [14].

In res ipsa cases, it is the court that decides as a matter of law whether there exists presumptive evidence of negligence against the defendant. Determination of whether there is, in fact, negligence is the function of the jury. The presumption of negligence continues to exist until the defendant has satisfied the court or jury, by a preponderance of evidence, that he or she was not negligent. If the defendant has thus satisfied the trier of facts, this presumption is destroyed. Thus, the sole question to be resolved in a res ipsa case is whether the defendant has overcome the presumptive evidence by establishing that he or she was not negligent [14].

In medical malpractice cases, the courts are generally reluctant to apply res ipsa in lawsuits involving error in diagnosis or the
choice of a method of treatment [15], the rationale being that the physician should not be required to explain why any particular diagnosis was not correct or why any particular scientific treatment did not produce the desired result. Nonetheless, the res ipsa doctrine may apply in cases involving erroneous diagnosis when the physician has used improper or inadequate methods of diagnosis. For example, in a Kentucky case in which a dentist who had extracted a tooth failed to take an x-ray that would have revealed that part of the tooth had not been removed, the court permitted the application of res ipsa because that particular method of diagnosis had become a matter of common knowledge [15]. Another example is an Iowa case in which the trial court judge refused to allow the jury to apply res ipsa in a lawsuit filed against a physician for applying a cast on a patient’s leg so tight that it led to impaired circulation and ultimately amputation. The Iowa appeals court reversed the lower court’s decision, ruling that res ipsa was applicable because it was a matter of common knowledge that such complications do not ordinarily occur when physicians using ordinary skill treat fractures.

Liberalizing Res Ipsa Loquitur: The “Conspiracy of Silence”

Initially most states held that res ipsa would be applicable in malpractice cases only when the common knowledge of laymen is sufficiently extensive to allow them to conclude that the plaintiff’s condition would not have existed but for the negligence of the physician, a classic example of which would be a case in which a surgical sponge was retained postoperatively. In a slowly moving but inexorable evolution, however, the doctrine of res ipsa began being applied more liberally to lawsuits in which ordinary laymen could not infer negligence solely on the basis of their own common knowledge. Judges began permitting res ipsa when a medical expert would simply testify that on the basis of his or her expert knowledge, the patient’s injury probably would not have occurred in the absence of negligence on the part of the defendant–physician [15].

A major factor that seems to have driven the trend toward liberalizing the applicability of res ipsa in malpractice litigation involving physician–defendants was the increasing tendency of the courts to favor injured patients. A Harvard Law Review article suggested that this tendency resulted from what many judges saw as a reluctance—indeed a refusal—of physicians to testify against their brethren: the so-called conspiracy of silence. The article referred to one judge’s observations [16]:

Regardless of the merits of the plaintiff’s case, physicians who are members of medical societies flock to the defense of their fellow members charged with malpractice and the plaintiff is relegated for his expert testimony to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancelation of his professional liability insurance policy.

The article went on to criticize medical societies that discouraged members from testifying by threatening expulsion or convincing doctors into believing incorrectly that the medical principles of ethics expressed disapproval of testifying against a fellow practitioner. Although today the so called conspiracy-of-silence phenomenon has been relegated by most observers to ancient history, its role in having contributed toward expanding the application of res ipsa in medical malpractice lawsuits cannot be denied.

Res Ipsa Loquitur and Expert Witness Testimony

In the typical nonmedical res ipsa personal injury lawsuit, the jury can reasonably draw on experience common to the community to determine whether the adverse event generally would not occur absent negligent conduct. In medical malpractice cases, however, the common knowledge and everyday experience of lay jurors may be inadequate to support this inference [17]. Courts across the nation have had to grapple with the question of whether to permit expert medical testimony to be used to educate the jury as to the likelihood that a medical adverse event would take place without negligence. In recent years courts in the majority of states (including but not limited to California, Illinois, Michigan, New Jersey, New Mexico, Ohio, Pennsylvania, and Wisconsin) have decided to allow such experts to “bridge the gap” between the common knowledge of the jury and the common knowledge of medical experts by allowing physicians to testify in res ipsa medical malpractice cases. A minority (Idaho, Maryland, Minnesota, and Texas) allow the inference of negligence only when the subject matter lies within the ken of a layperson [18, 19].

Medical expert testimony can be used to support the position of either of the adversary parties in a res ipsa lawsuit. On behalf of the plaintiff, the expert may opine that the adverse event was so rare that it could not have occurred in the absence of negligence. On the other hand, an expert witness for the defense may testify that, in spite of its rarity, the adverse event that occurred could well have occurred in the absence of negligence [20].

Although the great majority of appeals court decisions throughout the nation affirm the applicability of the res ipsa doctrine in medical malpractice lawsuits with or without medical expert witness testimony, a recent in-depth analytic decision of the Pennsylvania Supreme Court raised substantial doubts about the widespread use of the doctrine in medical malpractice litigation. A patient who received paravertebral nerve block injections from an anesthesiologist for treatment of severe shoulder and neck pain and who shortly thereafter suffered a pneumothorax filed a malpractice suit against the anesthesiologist. Although the plaintiff did not have a medical expert witness, the lawsuit was allowed to proceed to trial under the res ipsa doctrine. The jury found in the plaintiff’s favor, awarding $465,000, but in 2003, the verdict was reversed by the Pennsylvania Supreme Court [21]:

Traditionally, a plaintiff must present medical expert testimony to establish that the defendant–physician fell short of the required standard of care and that the breach proximately caused the plaintiff’s injury. A very narrow exception to the requirement of expert testimony in medical malpractice actions applies where the matter is so simple or lack of skill or care so obvious as to be within the range of experience and comprehension of even nonprofessional persons, conceptualized as the doctrine of res ipsa loquitur. Expert medical testimony only becomes necessary when there is no fund of common knowledge from which laymen can reasonably draw the conclusion of negligence. Thus, there are two avenues to avoid the production of direct medical evidence of the facts establishing liability: one being the reliance upon common lay knowledge that the event would not have occurred without negligence and the second, the reliance upon expert medical knowledge that the event would not have occurred without negligence.

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Res Ipsa Loquitor must be carefully limited, for to say whether a particular error on the part of a physician reflects negligence demands a complete understanding of the procedure the doctor is performing and the responsibilities on him at the moment of injury. Medicine is best defined by expert medical testimony. Without experts, we feel the jury could have no basis other than conjecture or speculation.

The performance of a paravertebral nerve block involves complex issues of anatomy, medical science, invasive procedures, and precision performance. Therefore, it was essential to the plaintiff’s claim to introduce expert testimony. This testimony was needed to first establish the standard of care required for the procedure and, second, that the physician breached that standard of care. These essential elements for a medical malpractice action do not evaporate when the doctrine res ipsa loquitur is applied. Accordingly, the plaintiff failed to establish his case of medical malpractice, and trial court committed error in permitting this matter to go to the jury without expert testimony.

The Pennsylvania Supreme Court then proceeded to launch into an eloquent, insightful, and somewhat passionate commentary regarding the profession of medicine and the ongoing challenges faced by physicians in their day-to-day practices. As did the 1894 Maryland Supreme Court dissenting opinion [12] and the William Howard Taft 1897 decision [13], the Pennsylvania court raised serious concerns that cavalier use of the res ipsa loquitur doctrine could subject physicians to liability simply on the basis of failure to cure or the occurrence of any complication, thus undermining the integrity of the profession [21]:

Public policy reasons exist for protecting physicians by limiting res ipsa loquitur in medical cases, which must be weighed against the public policy concerns of protecting the general public. First, doctors hold an important place in our society due to the role that they play in the health and even survival of the peoples of this nation. For that reason, society should not allow a doctor’s actions to be second-guessed at trial without a clear understanding of the standards required. Second, medicine is not an exact science. Much discretion exists in a doctor’s practice of medicine that should not be condemned in hindsight. Third, the practice of medicine is a complex and experimental field. Therefore, expert testimony is necessary to prevent a finding of liability for a simple mistake of judgment, failure of treatment, or accidental occurrence. Relaxing the burden of proof in medical malpractice cases might correct a perceived unfairness to some plaintiffs who could prove the possibility that medical malpractice caused an injury but could not prove its probability. However, health care providers might then find themselves defending cases simply because a patient failed to improve or when another course of action might possibly have brought a better result. No other professional malpractice defendant carries this burden of liability without the requirement that plaintiffs prove the alleged negligence to be probably, rather than possibly. Thus, we cannot approve substitution of such an obvious inequity for a perceived one.

One more aspect regarding expert testimony in res ipsa cases should be pointed out. As noted previously, the jury’s determination as to whether the res ipsa doctrine should apply in a given case may be based on expert testimony. Nothing in the law of most states, however, makes expert testimony a prerequisite to support the doctrine in every case. The trial court is specifically authorized to rely on either “the common knowledge of the layman, if it determines that to be adequate” or on expert medical testimony [22].

Res Ipsa Loquitur and Multiple Defendants

The question of whether multiple defendants can be held liable in a res ipsa case has been answered in the affirmative by the Supreme Court of California in a case in which a patient underwent an appendectomy while under general anesthesia. On awakening, the patient felt a sharp pain in his neck and right shoulder that increased over the next several days. Eventually the patient developed paralysis and atrophy of the shoulder muscles. Claiming that his injury was caused by the pressure that had been applied between his shoulder and neck during the surgical procedure, the patient filed a medical malpractice lawsuit against the physicians and the hospital under the res ipsa doctrine. The trial court dismissed the lawsuit based on the defense’s argument that the plaintiff’s failure to show which of the defendants had control during the surgery precluded the invoking of res ipsa against any one of them. The California Supreme Court reversed the lower court’s dismissal, issuing a written decision that elucidates key features of res ipsa cases [23]:

The doctrine of res ipsa loquitur has three conditions: (1) the accident must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agent or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. But we do not believe that either the number or relationship of the defendants alone determines whether the doctrine of res ipsa loquitur applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him, and each would be liable for failure in this regard.

The plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act. In the face of liberalization of a test for res ipsa loquitur, there can be no justification for rejection of the doctrine in this case.

Res Ipsa Loquitur in 2009

Notwithstanding that the court dismissed the res ipsa case that is discussed at the beginning of this article, the doctrine of res ipsa was invoked quite successfully by a plaintiff in a medical malpractice jury trial held in a Chicago courtroom in early 2009 [24]. A baby girl was delivered by an apparently uneventful cesarean delivery in a suburban Chicago hospital. Several hours after birth, the baby’s father noticed a laceration at the base of the baby’s middle finger. Careful examination revealed that the laceration had severed two flexor tendons, a portion of
the digital nerve, and extended into the bone of the finger. Several surgical procedures ensued over the next several years, but the child was left with permanent deformity and limited function of the finger.

A medical malpractice lawsuit under the doctrine of res ipsa was filed against the obstetrician and the hospital, contending that the injury would not have occurred without acts of negligence on the part of the obstetrician or hospital staff. At the conclusion of the trial, the jury awarded the family $2,756,000.

Summary

Res ipsa is applicable in medical malpractice cases in which a patient has been injured but the cause of the injury is either uncertain or unknown. The plaintiff in a res ipsa case is required to allege several elements. The first allegation is that in the normal course of events the patient injury on which the lawsuit was filed was under the defendant’s negligence. In a minority of states, a plaintiff’s expert witness is required in virtually all cases.

Many legal observers claim that there is an inherent unfairness in the res ipsa doctrine. Whereas under traditional common law in the United States a defendant is presumed to be innocent of any wrongdoing until proven otherwise, in res ipsa cases the jury may infer that the defendant is guilty of wrongdoing based simply on the adverse event itself or the testimony of the plaintiff, with or without expert witness support. In that situation, the defendant, instead of being presumed innocent, is in essence presumed to be guilty and thus bears the burden of producing evidence that convinces the jury that he or she is innocent of committing the negligent act that is alleged. In other words, the burden of proof that is borne by the plaintiff in the traditional medical malpractice lawsuit is shifted to the defendant–physician in a res ipsa lawsuit.

The frequency with which the res ipsa doctrine is being invoked in medical malpractice litigation appears to be increasing, not at a rate that is necessarily alarming but at a rate, nevertheless, sufficient to warrant awareness on the part of radiologists.

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