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## IS RES IPSA FOR THE DOGS?

H. W. HANNAH\*

The expressions "for the dogs" and "going to the dogs" must have originated in Asia—and most likely in a Muslim country where that faithful animal has historically been held in rather low repute.<sup>1</sup> Hence, being consigned to the dogs was bad; it meant that you had not done your "thing" well at all.

The burden of this article is not to maintain that *res ipsa loquitur* should be so relegated, but rather to see if it might *favor* the dogs or cats or cows or horses or pigs or laboratory animals in a controversy between a nasty veterinarian and a fine, upright animal<sup>2</sup>—represented in court these past few centuries by the owner, since animals have not been considered proper parties to a lawsuit since some time in the Middle Ages.<sup>3</sup>

### GENERAL PRINCIPLES OF RES IPSA LOQUITUR

*Res ipsa loquitur* is the darling of plaintiffs' attorneys in medical malpractice cases. It is one answer to the "conspiracy of silence," since it speaks for itself.

Credit for initiating the *res ipsa* doctrine goes to Pollock, C. B. who in the case of *Byrne v. Boadle*<sup>4</sup> said, "There are certain cases of which it

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1. Mark Twain was sorely disappointed in the "Celebrated dogs of Constantinople." Instead of fierce and ferocious packs he found "utterly wretched, starving, sad-visaged, brokenhearted looking curs . . . mangy and bruised and mutilated . . . the sorriest beasts that breathe . . . in their faces a settled expression of melancholy. . . ." MARK TWAIN, *INNOCENTS ABROAD* 257 (1869).

2. *Animal* has been defined in different ways: "Any member of the group of living beings typically capable of spontaneous movement and rapid motor response to stimulation." WEBSTERS NEW COLLEGIATE DICTIONARY; ". . . all living creatures not human." BLACK'S LAW DICTIONARY. "Man" is not classed as an animal in veterinary practice acts, cruelty to animals laws and other laws obviously not designed to include man, although biologically he is an animal. The Massachusetts law on the use of animals for experimental purposes states that "Animal (includes) the dog and the cat specifically and all other sentient creatures other than man." MASS. GEN. LAWS ANN. ch. 49A, § 1 (1966).

3. For a time during the Middle Ages, particularly in France and Germany, trials in which animals were defendants were quite common. Capital punishment was decreed for pigs, cows, horses or other domestic animals found guilty of killing or injuring human beings; and in the ecclesiastical courts, actions to excommunicate or excoriate were brought against pests of various kinds—mice, rats, locusts and roaches. These were *bona fide* trials with counsel appointed to defend the animals. Apparently a few lawyers gained some notoriety as successful defense attorneys in these trials. E. EVANS, *THE CRIMINAL PROSECUTION AND PUNISHMENT OF ANIMALS* (1906).

4. 2 H & C 722, 159 Eng. Rep. 299 (Exch. 1863).

may be said 'res ipsa loquitur' and this seems to be one of them. In some cases the courts have held that the mere fact of the accident having occurred is evidence of negligence. . . ."<sup>5</sup> In *Byrne v. Boadle* a barrel of flour rolled out a warehouse window and struck the plaintiff. Judge Pollock opined that a barrel could not roll out of a warehouse without some negligence. Why, he said, should the plaintiff have to call witnesses to prove such negligence? In this case he referred to the theory of presumptive negligence—which might very well have become the name for the res ipsa loquitur theory had the judge not chosen to use Latin terminology in his decision. Judge Pollock also made other pronouncements in the *Byrne* case which a hundred years later are still being discussed by legal writers as facets of the res ipsa theory. Among them are the following:

A judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant.<sup>6</sup>

All accidents do not raise a presumption of negligence.<sup>7</sup>

The presumption of negligence calls upon the defendant to explain. If he can explain, then the case proceeds normally—that is, the plaintiff must establish negligence by evidence.<sup>8</sup>

A definition of res ipsa loquitur which will satisfy both plaintiff's and defendant's attorneys is difficult to formulate. In *Johnson v. Marshall*<sup>9</sup> the court stated:

[Res ipsa loquitur] asserts that whenever a thing which produced injury is shown to have been under control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care had been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care.<sup>10</sup>

Perhaps a better approach to an understanding of res ipsa loquitur would be to analyze the circumstances under which it arises and the purpose of the rule. Prosser<sup>11</sup> indicates that three conditions must exist

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5. 159 Eng. Rep. at 300.

6. *Id.*

7. *Id.*

8. *Id.*

9. 241 Ill. App. 80 (1926).

10. *Id.* at 89.

11. PROSSER, TORTS 295 (3d ed. 1964).

before res ipsa loquitur will arise: 1) The accident must have been one which does not ordinarily occur unless there is negligence. 2) The agency or instrumentality causing the injury complained of must have been within the control of the defendant. 3) The injury must not have been due to any voluntary action or contribution on the part of the plaintiff.<sup>12</sup>

Wigmore<sup>13</sup> warns against relegating res ipsa loquitur to the status of a stereotyped rule to be arbitrarily applied in all circumstances. It must be remembered that the basic reason for application of the theory is that, innocent or not, the chief evidence of the cause of the injury is, as a practical matter, accessible to the defendant but is inaccessible to the plaintiff. Some current writers would take issue with Wigmore saying that in view of modern discovery methods and more liberal rules of court, evidence in many cases will be as accessible to the plaintiff as to the defendant.<sup>14</sup> However, it is not the burden of this article to discuss discovery techniques but rather to determine if res ipsa loquitur can come to the aid of dogs, cats and other animals—excluding man.

The doctrine has been held applicable when facts and circumstances permit an inference of negligence, growing out of superior knowledge, control and management by the defendant and when the event as a matter of common knowledge and experience would not have occurred unless there were negligence.<sup>15</sup> The doctrine is not based on established facts<sup>16</sup> but on inferred facts and hence is not the same as circumstantial evidence, though some writers describe it as a species of circumstantial evidence. Nor is res ipsa loquitur a rule of law or pleading. Its rejection does not mean that negligence may not be established by circumstantial or by direct evidence. Conversely, acceptance by the court does not preclude the defendant from explaining the circumstances and, on trial, successfully rebutting the plaintiff's evidence. Once the defendant has explained the presumption of fault, the plaintiff must then go forward with his proof and establish negligence by a preponderance of the evidence.

In some jurisdictions the res ipsa loquitur theory shifts the burden of going forward with the evidence to the defendant; and in a few jurisdictions the burden of proof is shifted to the defendant.<sup>17</sup> Though in a majority of jurisdictions the burden of proof remains with the plaintiff, use of the res ipsa loquitur theory does create a prima facie case. If the

12. *Id.*

13. 9 WIGMORE, EVIDENCE, § 2509 (3d ed. 1940).

14. See Comment, *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, 60 NW. U. L. REV. 852, 867 n.70 (1966).

15. *Tayer v. York Ice Mach. Corp.*, 342 Mo. 912, 119 S.W.2d 240 (1937).

16. *O'Rourke v. Marshall Field & Co.*, 307 Ill. 197, 138 N.E. 625 (1923).

17. *The Application of Res Ipsa Loquitur in Medical Malpractice Cases*, *supra* note 14 at 854-56.

defendant offers no explanation, he cannot be awarded a directed verdict and the case goes to the jury. On the other hand, failure of the defendant to present any evidence does not permit a directed verdict for the plaintiff—unless there is no question of fact and the negligence of the defendant is clear. However, in nearly all cases where the *res ipsa loquitur* doctrine is used, there will be a question of fact. Though the jury is not bound to give any particular weight to the inference of negligence created by the theory, such an inference may nevertheless make the defendant's case more difficult since, in the opinion of many, juries in medical malpractice cases are plaintiff-oriented; and the jury, not the court, draws the inference.<sup>18</sup>

#### VETERINARIANS AND THE RES IPSA LOQUITUR THEORY

##### *General Application of Res Ipsa Loquitur to Veterinary Medicine*

In medical malpractice cases, plaintiffs are ordinarily confronted with the difficulty of obtaining expert medical testimony. Also, in many instances they are either unconscious at the time of injury or not cognizant of the circumstances or procedures which gave rise to their injury. When applicable, the theory of *res ipsa loquitur* helps the plaintiff clear both these hurdles by dispensing with the necessity for expert testimony and by inferring from facts and circumstances that there must have been negligence, for the injury would not otherwise have occurred. Since plaintiffs in veterinary medical malpractice cases are confronted with similar problems, it would appear that the *res ipsa loquitur* theory is just as applicable to veterinary medicine as it is to human medicine.

The so-called "conspiracy of silence" is not confined to the medical profession. With good reason, any professional man, be he doctor, lawyer, veterinarian or engineer, is hesitant to testify against a fellow professional. When one considers the important consequences to the professional man of absence from his work and of uncertainty regarding the time or times he will be needed, and the feeling of being something of a "dirty dog" for testifying against a fellow professional and the further feeling that somehow it is not good for the profession, the "conspiracy of silence" becomes quite understandable. If difficulty in procuring expert testimony is not as great in the veterinary profession as it is in the medical profession, it is simply because there is so much less litigation. Reported medical malpractice cases throughout the country now number in the thousands whereas reported veterinary malpractice cases probably do not exceed a few hundred. In the writer's state of Illinois there are several hundred

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18. See Carr, *Res Ipsa Loquitur in Ohio—Does Any "Thing" or "Control" Speak for Itself*, 29 OHIO ST. L.J. 399 (1968).

appellate and supreme court cases involving medical malpractice and not a single one involving veterinary malpractice. It is likely that throughout the country the ratio of appellate court cases to trial court cases involving veterinary malpractice is lower than for medical malpractice since claims would ordinarily be much smaller and an appeal by either party less likely. There may, therefore, be more trial court activity than reported appellate court cases indicate.

*Application of the Knowledge Requirement to Veterinary Medicine*

That facet of the res ipsa loquitur theory concerning the plaintiff's lack of knowledge of the circumstances of his injury, it is submitted, applies even more strongly in the field of veterinary medicine than in the field of human medicine. First, animals cannot talk (this is the current assumption<sup>19</sup>), and hence could not relate any of the veterinarian's wrongdoing even if they were conscious. Secondly, there is less likelihood of nurses, anesthetists and other ancillary personnel being present during surgery or postoperative care; hence, the res ipsa loquitur theory has clearer sailing since the veterinarian is likely to be the only one who can explain what happened. While it is true that in a large animal practice the owner or members of his family may be present while a veterinarian is treating an animal, an increasing percentage of today's veterinary practice is concerned with small animals and is conducted in a veterinary hospital where the owner is not so likely to be present when an animal is treated or surgery is performed. Also, contract practice under which a veterinarian undertakes to make periodic visits to large herds or flocks is growing. Since such visits are regarded as routine, the owner or his agent would usually not feel he need accompany the veterinarian unless asked or unless some special situation had arisen requiring his presence. The presence of the owner during treatment of his animal does not necessarily preclude the use of the res ipsa loquitur theory. It simply makes it less likely that the theory will apply, since the owner might then be able to supply by direct evidence the "common knowledge" which undergirds the theory.

In medical malpractice cases involving res ipsa loquitur several

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19. There is evidence that this assumption is not wholly correct. Not only do studies show that animals communicate with each other but that some, to a limited extent, can communicate with man using man's language. R. SMYTHE, *HOW ANIMALS TALK* (1961); Conly, *Porpoises: Our Friends in the Sea*, NATIONAL GEOGRAPHIC MAGAZINE, Sept. 1966, Vol. 130, No. 3. Animal psychology has become an important subject in veterinary curricula, and veterinary practice acts are being revised to include treatment of animals for a mental condition in the definition of "practice of veterinary medicine." See, e.g., ILL. REV. STAT. ch. 91, § 124.3(1) (1967). Certainly a veterinarian should "understand" animals better than most laymen understand them.

rules and exceptions to rules have evolved. In the section which follows we shall examine some of these rules as they appear to apply in the field of veterinary medicine.

#### THE RULES OF RES IPSA LOQUITUR AND THE VETERINARIAN

##### *The Veterinarian's Control and Custody*

Most medical malpractice cases involving the res ipsa loquitur theory have grown out of hospital situations. Injury by X-ray, burns from hot water bottles, foreign objects left in an incision, improper administration of anesthesia, physical injury resulting from restraint or movement of the patient, removal of the wrong bodily organ and injury to a remote part of the body while performing surgery in a specific area are some of the situations which have given rise to the application of the doctrine in human medicine. Even a stronger argument can be made for the application of the doctrine in animal hospital situations because, coupled with the control essential to application of the doctrine is physical custody of the patient amounting to a bailment. However, one should not too extensively generalize because the degree of control by the defendant is itself a question of fact. The large animal practitioner, for example, may be aided by the owner in treating an animal or in performing surgery, in which case the owner himself would not only have some knowledge of the procedures used but might himself be guilty of contributory negligence. An added factor in veterinary situations is the temperament of an animal. A wild and unruly dog or cat, for example, might prevent operation of the doctrine when it might otherwise be applicable.

##### *The Client's Contributory Negligence*

Prosser indicates that absence of contributory negligence is essential if the doctrine of res ipsa loquitur is to apply.<sup>20</sup> Though contributory negligence may constitute either a complete or partial bar to recovery by the plaintiff, depending on the jurisdiction in which suit is brought, it would, according to Prosser, constitute a *complete* bar to the use of res ipsa loquitur. The plaintiff as well as the defendant would be called upon to explain circumstances surrounding the injury. However, as with other cases in which contributory negligence is alleged, such negligence must be a direct causal factor. Thus in *Breece v. Ragan*<sup>21</sup> a veterinarian was held liable for the loss of plaintiff's cattle which were trampled and killed when they became frightened while he was vaccinating them. The plaintiff's father and a hired man had helped drive the cattle into a barn prior

20. PROSSER, TORTS 295 (3d ed. 1964).

21. 234 Mo. App. 1093, 138 S.W.2d 758 (1940).

to vaccination but did not enter the pen where the cattle were being vaccinated or help the veterinarian in any way. The court held that there was no contributory negligence. In view of the current trend in *res ipsa loquitur* decisions, contributory negligence could very well have been applicable in *Breece v. Ragan*. If the theory had been urged, then the precise conduct of the plaintiff's father and the hired man would have become important. Were they actually present? Did they observe what the veterinarian was doing? Did they realize what was happening? Did they say anything to him? Since post-treatment care, and in many cases even postoperative care, ordinarily rests with the owner of an animal, contributory negligence should suggest *itself* to the veterinarian's attorney as a likely defense.

### *The Common Knowledge Concept*

The veterinary profession is much younger than the medical profession. Until fairly recent times, a court of law was likely to assume that a farrier, horseshoer, stablekeeper, groom or almost anyone who had daily contact with animals knew as much about them as the "horse doctors" and the veterinarians of the day. Needless to say, this situation is changing. The profession of veterinary medicine is recognized as calling for the same high degree of skill and scientific endeavor as human medicine. Indeed, in many areas the two professions are linked in their endeavor to investigate some of the major diseases of men and animals.

Regardless of the present stature of veterinary medicine as a profession and a science, courts are still likely to assume that there is more common knowledge about the treatment of animals than there is about the treatment of man. It is well established that *res ipsa loquitur* will not apply unless a layman can infer as a matter of common knowledge that the injury would not have occurred except for the defendant's negligence. It would seem, therefore, that the applicability of *res ipsa loquitur* would be more extensive in veterinary malpractice cases than in medical malpractice cases. This accords with the theory that the doctrine is applicable only if a jury does not need the aid of an expert to find negligence. In other words, as previously indicated, the injury must be one which a layman knows would not ordinarily occur unless there is negligence.

Reliance on the common knowledge doctrine will most likely increase rather than diminish. Some of the factors responsible for such an increase include the reluctance of professionals to testify against one another, increased difficulty of the plaintiff in obtaining adequate proof and recognition by the courts that the average juror's common knowledge has increased. In more recent medical malpractice cases the doctrine has



been extended to the faulty administration of anesthesia<sup>22</sup> and even to cases of erroneous diagnosis where a certain diagnostic procedure is common knowledge but was not used by the physician.<sup>23</sup>

There is no reason to believe that circumstances in the field of medical practice permitting application of the common knowledge concept to support the *res ipsa* theory do not apply in the field of veterinary medicine, though there seem to be no cases in the latter field directly in point.

#### Care and Skill of the Veterinarian

The care and skill required of a veterinarian corresponds to that which the courts have established for members of the medical profession. In *Kerbow v. Bell*,<sup>24</sup> a veterinarian caused the death of four hound dogs by dipping them in a mange solution which was too strong. The court said:

A person professing and undertaking to treat animals is bound to use in performing the duties of his employment such reasonable skill, diligence, and attention as may ordinarily be expected of careful, skillful and trustworthy persons in his profession. And if he does not possess and exercise these qualities, he is answerable for the result of his want of skill or care.<sup>25</sup>

In many cases the skill owed by a veterinarian has been measured against that of other veterinarians in his locality. It is submitted, however, that in view of the great increase in scientific medical knowledge and in the ability to communicate such, the "locality" rule is either outdated or the locality should be constituted of a much larger geographical area than originally conceived. Though a veterinarian and a medical doctor were called as witnesses in the *Kerbow* case, their testimony was conflicting and it is a fair assumption that the defendant veterinarian could have been found liable without their testimony. In refusing to accept the defendant's contention that there was insufficient professional or expert testimony to sustain the verdict, the court said that the defendant's own testimony plus the direct evidence of several witnesses who ran the hounds two days prior to their immersion in the defendant's dip and who testified that they were then in good condition was sufficient.

Another case which illustrates how *res ipsa loquitur* might apply in

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22. *Voss v. Bridwell*, 188 Kan. 643, 364 P.2d 955 (1961).

23. *Butts v. Watts*, 290 S.W.2d 777 (Ky. 1958). In this case the doctrine of *res ipsa loquitur* was held applicable when a dentist failed to X-ray a tooth and hence did not discover that part of it had not been removed.

24. 259 P.2d 317 (Okla. 1953).

25. *Id.* at 319.

the field of veterinary medicine is *Erickson v. Weber*.<sup>26</sup> The defendant veterinarian was called to administer a worm remedy to the plaintiff's sheep. Following his administration of the remedy, sixty-one sheep died. The plaintiff claimed that the defendant, through his lack of knowledge or skill, permitted the medicine to enter the sheep's lungs. A judgment for the plaintiff was sustained. Though there was expert testimony in the case, the court stated:

This testimony was substantiated by a reference to a treatise on diseases of sheep by a recognized authority and bulletins of the United States Department of Agriculture on the same subject. There was ample evidence to sustain the contention of plaintiff's that the medicine was administered in a manner which, according to the opinion of experts, is usually fatal.<sup>27</sup>

The court might have added that livestock men generally know how to administer a liquid to an animal without getting it in the lungs. This was a case which could very well have been decided without the use of expert testimony. The same type of reasoning supports the decision in *Voss v. Bridwell*,<sup>28</sup> a 1961 Kansas medical malpractice case in which the res ipsa loquitur theory was held to apply when oxygen for an anesthetized patient was channeled into the esophagus rather than the larynx.

In *Staples v. Steed*,<sup>29</sup> the court held that throwing and hobbling a horse was part of a veterinarian's treatment and that throwing the horse on the side of a hill with unusual and unnecessary violence resulting in its death from a ruptured diaphragm was negligence on the part of the veterinarian. This case suggests that while some methods of restraining animals or positioning them for surgery may involve knowledge solely within the province of the professional, there are some methods which fall in the area of common knowledge. Throwing a hog, for example, or using a squeeze gate on a cow would seem to fit in this latter category.

### Calculated Risk and Bad Result Concepts

An important limitation on the application of res ipsa loquitur is the principle that the doctrine will not apply when the injury complained of may occur even though reasonable care has been exercised. This limitation has been further refined through the development of the "calculated risk" and "bad result" concepts. The former applies where an accepted method of medical treatment is known to involve a risk which

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26. 58 S.D. 446, 237 N.W. 558 (1931).

27. 237 N.W. at 560.

28. 188 Kan. 643, 364 P.2d 955 (1961).

29. 167 Ala. 241, 52 So. 646 (1910).

may produce damaging results regardless of care. If the defendant can show that an accepted method of treatment involves a calculated or even an unexpected risk, expert testimony must then be used to determine if the damage was unavoidable or if it in fact resulted from the defendant's negligence. In this connection, medical statistics and the history of a significant number of cases involving the particular kind of treatment can be introduced as evidence.

The so-called "bad result" rule is probably not so much a theory as it is another way of saying that unless the jury can find as a matter of common knowledge that the harm was probably caused by negligence, the *res ipsa loquitur* doctrine is not applicable. As with medical practitioners, veterinarians do not guarantee a cure and in rendering their service are held accountable only for performing according to the standards of the profession.<sup>30</sup> Evidence of an unsuccessful treatment is not alone sufficient to raise an inference of negligence. If a veterinarian treats an animal and it either dies or fails to improve, there would be no cause of action against the veterinarian arising from these facts alone. But in medical practice there has been some inroad on the "bad results" exception. In *Daiker v. Martin*,<sup>31</sup> the physician set a cast overly tight, resulting in impaired circulation and an infection in the plaintiff's leg. The leg had to be amputated. The court sustained the plaintiff's contention that, as a matter of common knowledge, such things do not ordinarily occur if the physician uses ordinary skill. The *res ipsa loquitur* doctrine was held to apply. A similar result was reached in *Olson v. Weitz*<sup>32</sup> when after a cast placed on plaintiff's arm by the defendant was removed, the bone showed a marked displacement and a bone graft was necessary to correct the condition. The above cases suggest that the doctrine could apply in similar situations involving a veterinarian's treatment of an animal. These cases also suggest that there might be such a thing as a circumstance being "within the common knowledge of experts." In other words, if an expert can say that as a matter of accepted expert opinion certain events do not occur unless there is negligence, the jury could then infer negligence from the happening of the event, thus establishing something which might be called "common expert knowledge" or "expert common knowledge."

Although we have seen that *res ipsa loquitur* may be applied in medical malpractice cases when the complaint involves a faulty diagnosis, an improper inoculation or failure to give proper aftercare following surgery, cases of this nature involving *res ipsa loquitur* seem not to have

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30. *Barney v. Pinkham*, 29 Neb. 350, 45 N.W. 694 (1890).

31. 250 Iowa 75, 91 N.W.2d 747 (1958).

32. 37 Wash. 2d 70, 221 P.2d 537 (1950).

arisen in the veterinary field. In the few reported cases involving a claim of improper diagnosis by a veterinarian, expert testimony has been used.<sup>33</sup>

Defects in equipment used by a veterinarian resulting in injury to an animal may permit use of the *res ipsa loquitur* doctrine. If the defect is latent and could not have been discovered by the veterinarian, certainly the theory would not apply. On the other hand, if it is something about which the veterinarian has knowledge—insecure fastening of X-ray equipment, permitting it to fall on the patient—the theory would apply. Obviously the defect must be of such a nature as to indicate that harm will result to a patient. If it is the kind of defect which does not make injury resulting from its use foreseeable, the *res ipsa loquitur* theory would not, of course, apply.

Advances in scientific knowledge, development of new products and equipment and acceptance today of that which was rare yesterday, all expand the area in which the *res ipsa loquitur* doctrine can apply. For example, testing the patient for drug reaction and allergy has now become accepted. In the years ahead, practices unknown today will come to be generally accepted and enter the domain of “common knowledge.”

Either by common law or Good Samaritan statutes, veterinarians may be excused from ordinary negligence in the treatment of human patients at the scene of an accident.<sup>34</sup> Civil Defense laws provide similar relief. Yet there may still be a place for *res ipsa loquitur* under these circumstances. If “gross negligence” becomes the standard it might be said to be even more evident to the average man that a doctor or a veterinarian has acted “grossly” than that he is guilty of only ordinary negligence. Furthermore, control by the veterinarian in such situations is likely to be much more complete—hence, fulfilling to an even greater degree one of the requirements for the application of *res ipsa loquitur*.

#### *Multiple Defendants—Respondeat Superior*

With the growth of specialization in medical practice and in hospital procedures, several persons may be involved when a patient is treated. This is particularly true when there is surgery. If there is fault and the

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33. *Bekkemo v. Erickson*, 186 Minn. 108, 242 N.W. 617 (1932) (failure to diagnose hog cholera); *Hohenstein v. Dodds*, 215 Minn. 348, 10 N.W.2d 236 (1943) (mistakenly diagnosing and vaccinating for hog cholera); *Phillips v. Leuth*, 200 Iowa 272, 204 N.W. 301 (1925) (alleged negligent diagnosis and improper method of vaccinating hogs—held for the defendant); *Boom v. Reed*, 69 Hun 426, 23 N.Y.S. 421 (Sup. Ct. 1893) (failure to return and check on horse under treatment by the defendant).

34. “May be excused” is used advisedly since many Good Samaritan statutes do not include veterinarians, and the common law theory about the liability of one who renders aid in an emergency is by no means uniform from state to state. In some it provides as much protection as a Good Samaritan statute; in others, it does not.

evidence does not clearly point to a particular person, how does the plaintiff proceed? Is *res ipsa loquitur* ever applicable in these situations?

If all of the persons involved are employees or agents of the practitioner, the problem is simplified. It does not matter then which person caused the injury; the plaintiff need sue only the principal, and under the theory of *respondeat superior*, the principal can be held liable regardless of where the fault actually rests. This would probably be an answer in most veterinary malpractice cases, though in the large cities and in some animal hospitals, more than one independent party may be involved.

There is authority for the application of *res ipsa loquitur* even if, for example, the anesthetist or X-ray technician is not an employee or agent of the veterinarian. In *Ybarra v. Spangard*,<sup>35</sup> a landmark decision in which the plaintiff awoke from an appendectomy to find that his right shoulder had been injured, the diagnosing practitioner, the surgeon, the physician-owner of the hospital, an anesthetist, a nurse on duty during surgery and a special nurse assigned to his room after the operation were all joined as defendants. The trial court granted the defendant a non-suit from which the plaintiff appealed claiming that the *res ipsa loquitur* doctrine applied. The California Court of Appeals reversed the trial court and held for the plaintiff saying that it was sufficient for him to show that he awakened with an injury not connected with surgery and that this may constitute "as clear a case of identification of the instrumentality as the plaintiff may ever be able to make."<sup>36</sup> This seems consistent with other decisions in which a plaintiff is not put to the risk of determining, among several persons actually participating in an event, who actually caused the injury or damage complained of.<sup>37</sup> As a matter of fact, an even stronger case might be made for the application of *res ipsa loquitur* under the circumstances in *Ybarra*. If the purpose of the doctrine is to permit the plaintiff to make a case when it is clear that there has been negligence but the plaintiff is unable to state how it happened, then by the same token he should be able to use the theory when he is unable to say who is responsible, but knows that it must be one of a determinable group of persons. Such a situation might create some pressure on the person actually responsible to speak up, for if he does not, the innocent members of the group who have to compensate the plaintiff may seek retribution.

In veterinary malpractice cases involving an employee or agent of

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35. 25 Cal. App. 2d 486, 154 P.2d 687 (Sup. Ct. 1944).

36. 154 P.2d at 690-91.

37. In *Fowler v. Cade*, 214 Ill. App. 153 (1918) the court held the defendant liable for all the damage done to the plaintiff's sheep where evidence showed the defendant's dog to have been one of a pack of dogs attacking the sheep; other dog owners were not known and the exact damage caused by the defendant's dog could not be ascertained.

the veterinarian, the courts have had no difficulty in applying the respondeat superior theory and finding the veterinarian liable.<sup>38</sup> Also, in medical malpractice cases, though nurses or other hospital personnel are not employees of a surgeon, they may be regarded as his agents if they were under his direction and control at the time the injury complained of occurred. This is sometimes referred to as the "concert of action" or "captain of the ship" doctrine. It is just as applicable in veterinary medicine as in human medicine.

#### CONCLUSION

Acceptance of *res ipsa loquitur* in medical malpractice cases has increased markedly—so much so in the opinion of some writers and legal scholars that defendants are often times held liable without a clear case having been made against them. This is said to stem, in part at least, from the philosophy that an injured patient should not go uncompensated. The impact of this philosophy will likely be felt in veterinary malpractice cases, though to a lesser degree.

In considering the application of the *res ipsa loquitur* theory to veterinary malpractice cases, the following observations are relevant: 1) The mere fact that an animal was injured by a veterinarian or by his employees or agents does not support application of the doctrine. 2) A presumption created by application of *res ipsa loquitur* yields to any contrary proof and is thus destroyed. 3) There may be an inference of negligence on the part of the veterinarian without the *res ipsa loquitur* doctrine applying. 4) An admission by the veterinarian that his act caused the injury complained of may create a presumption in favor of the plaintiff but does not justify application of the *res ipsa loquitur* theory if the defendant disclaims fault (unless, of course, it would otherwise apply). 5) Application of *res ipsa loquitur* does not depend on a contractual relation. It could be applied to a veterinarian rendering gratuitous service, to Civil Defense and emergency cases and to other situations in which there is no privity of contract.

With advances in science and standards of the veterinary profession, the practitioner's vulnerability to malpractice actions, whether or not *res ipsa loquitur* applies, is likely to increase. As more sophisticated equipment is introduced into the practice of veterinary medicine, more selective drugs and medicines made available and more persons brought under

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38. In *Acherman v. Robertson*, 240 Wis. 421, 3 N.W.2d 723 (1942), the defendant veterinarian's son who was helping him sold a client Lysol, mistaking it for mange oil; and in *Beck v. Henkle-Craig Live-Stock Co.*, 171 N.C. 698, 88 S.E. 865 (1916), an assistant of the veterinarian failed to adequately restrain a mule. In both cases the veterinarian was held liable for the damage which resulted.

the control of the veterinarian in his practice, a plaintiff will have a greater number of opportunities to seek compensation for an alleged negligent injury to his animals.